TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 268

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
PETITIONER,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1925

CERTIORARI GRANTED MARCH 16, 1925

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[fol. 1] STATE OF MINNESOTA,
First Judicial District:

IN DISTRICT COURT OF DAKOTA COUNTY

EDITH F. COOGAN, as Special Administratrix of the Estate of William Coogan, Deceased, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant

SUMMONS

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which complaint is hereto attached and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their address designated below within twenty (20) days after service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff will apply to the court for the relief de-
[fol. 2] manded in said complaint.

T. D. Sheehan and H. J. Goodwin, Attorneys for Plaintiff,
St. Paul, Minnesota.

IN DISTRICT COURT OF DAKOTA COUNTY

BILL OF COMPLAINT

Plaintiff for her cause of action against the defendant states and alleges:

I

That the said defendant now is, and during all the times hereinafter mentioned was a railroad corporation, duly organized, created and existing under and by virtue of law, and as such, during all said time was and now is engaged in the operation of a railroad in the states of Minnesota, Wisconsin, Iowa and other states, and as such owned, operated and maintained tracks, yards, cars, locomotive engines, and other appurtenances thereunto belonging and especially a yard at the city of Farmington, Dakota county, state of Minnesota.

II

That on the 14th day of July, 1923, one William Coogan, who was then and there a resident of Mower county, state of Minnesota, died intestate in Dakota county, state of Minnesota, and left sur-

viving him as his heirs at law this plaintiff, who was the wife of said deceased, and six children of said deceased and this plaintiff. That the names and ages of said children are as follows: Floretta, age thirteen (13) years, Edgar, age twelve (12) years, Kenneth, [fol. 3] age ten (10) years, Doris, age eight (8) years, Carlton, age five (5) years, Lucy, age two (2) years. That this plaintiff and said children were all dependent upon said deceased for their support and maintenance, and it is in their interests and behalf that this action is brought.

III

That on the 10th day of October, 1923, this plaintiff was, by order of the Probate Court, in and for Mower county, state of Minnesota, duly appointed as special administratrix of the estate of said William Coogan, and duly accepted said appointments and qualified as such, and is now so acting.

IV

That on the 14th day of July, 1923, and for a long time prior thereto, the defendant owned tracks and yards, and in particular maintained a yard in the city of Farmington, Minnesota, and operated freight and passenger trains between said Farmington and Austin, Minnesota, and to other points in Minnesota, Iowa and Illinois.

V

That on the 14th day of July, 1923, the said William Coogan was in the employ of said defendant as a freight brakeman on one of said defendant's freight trains from the city of Farmington, to the city of Austin, in the state of Minnesota, and that while said train on which said William Coogan was so employed was being made up in the yard of the defendant in the city of Farmington, Minnesota, it became the duty of said William Coogan to couple the air hose between the cars then and there standing on one of de- [fol. 4] fendant's tracks in the said yard as aforesaid, said cars being part of the train on which said Coogan was employed, and while said William Coogan was in the discharge of his duty as aforesaid, and had stepped between the caboose of his train and the car coupled thereto for the purpose of connecting the air hose, when said caboose and cars were caused to move backward by other cars coming in contact therewith to be coupled thereon, the said William Coogan attempting to step from between said cars by reason of the carelessness and negligence of the said defendant in improperly constructing upon the ties of said track immediately outside one of the rails of said track, and above said ties, what is known as an air pipe line, and maintaining said air pipe line in a loose, unfastened, warped, bent and dangerous condition, and in too close proximity to the rail of said track, that by reason thereof the said William Coogan's left foot became caught and securely fastened

beneath said air pipe line thereby causing him to be thrown to the ground (and caught by the rigging used in connection with the wheels of said car coupled to said caboose), thereby causing the wheels of said car to come in contact with said William Coogan's body, causing him serious injuries from which he shortly thereafter died. That at the time of said accident the said defendant and said William Coogan were engaged in connection with the operation of a train then and there engaged in interstate commerce, and commerce between different states.

[fol. 5] VI

That before said accident and death, said William Coogan was a strong, ablebodied man, of good health, thirty-nine (39) years of age, and was earning and capable of earning the sum of two hundred ($200.00) dollars per month, and that at said time said deceased was in line for promotion as conductor, and had passed examination for such position and at times had operated defendant's train as conductor thereon.

That by reason of the facts aforesaid plaintiff has been damaged in the sum of fifty thousand ($50,000.00) dollars.

Wherefore, plaintiff prays judgment against said defendant for the sum of fifty thousand ($50,000.00) dollars, together with the costs and disbursements of this action.

T. D. Sheehan and H. J. Goodwin, Attorneys for Plaintiff, St. Paul, Minnesota.

IN DISTRICT COURT OF DAKOTA COUNTY

ANSWER

Comes now the defendant and for answer to the complaint of the plaintiff herein alleges and shows as follows:

I

Admits that the defendant now is, and during all the times mentioned in the complaint was, a railway corporation, duly organized, created and existing under and pursuant to the laws of the state of [fol. 6] Wisconsin, owning and operating lines of railway in that state, Minnesota and certain other states, including yards and tracks in or near Farmington, in the state of Minnesota.

II

Admits that on July 14th, 1923, William Coogan was employed by the defendant as a brakeman.

III

Alleges that the death and injury to the decedent William Coogan, mentioned in the complaint of the plaintiff, was caused solely by the want of due care on the part of said deceased himself.

IV

For further answer defendant alleges that if there were any risks incident to the employment of said deceased, said risks were open and obvious to said deceased and understood and appreciated by him, and by him assumed.

V

Save as hereinbefore admitted, qualified or alleged, defendant denies each and every allegation, matter, fact and thing contained in the complaint of the plaintiff.

Wherefore, defendant demands judgment against the plaintiff that she take nothing by this action and for defendant's costs and disbursements herein.

Dated November 1, 1923.

F. W. Root, C. O. Newcomb, and A. C. Erdall, Attorneys for Defendant, Minneapolis, Minn.

[fol. 7] IN DISTRICT COURT OF DAKOTA COUNTY

REPLY

Comes now the plaintiff and for her reply to the answer of the defendant in the above entitled action states:

I

Plaintiff denies each and every allegation, matter and thing in said answer contained, except such as are admissions of the matters and things affirmatively alleged in plaintiff's complaint.

II

Plaintiff specifically denies that the death of said decedent William Coogan, was caused or contributed to by reason of any want of due care on his part. Denies that his death was the result of risks incident to the employment of said deceased, or that the death of said deceased was caused by reason of risks assumed by him.

Wherefore, plaintiff demands judgment as prayed for in her said complaint.

T. D. Sheehan and H. J. Goodwin, Attorneys for Plaintiff, St. Paul, Minnesota.

IN DISTRICT COURT OF DAKOTA COUNTY

Settled Case

CAPTION

The above entitled action came on for trial before Hon. Willard L. Converse, judge, and a jury, at Hastings, Minnesota, on the 11th day of December, 1923. T. D. Sheehan and H. J. Goodwin, Es- [fol. 8] quires, of St. Paul, Minnesota, appeared in behalf of the plaintiff and A. C. Erdall, Esquire, of Minneapolis and W. H. Gillitt, Esquire, of Hastings, Minnesota, appeared in behalf of the defendant.

A jury was duly impaneled and sworn.

ARGUMENT OF COUNSEL

Mr. Sheehan opened the case to the jury, as follows:

May it please the court—ladies and gentlemen of the jury. Mr. Gillitt indicated to you briefly what this case was about, but my duty at this time and especially in this case is to outline to you more in detail what the case is about and what the plaintiff in this case expects to prove, the facts that we expect to produce before you in evidence under which we claim she is entitled to recover a verdict at your hands, and it may be necessary to go more into detail than I usually do in cases at this stage of the trial, by reason of the fact, as counsel has intimated and as I believe will appear from the evidence, this case is based wholly upon circumstantial evidence, in other words, there were no eye witnesses to the accident itself. Mr. Coogan was in the employ of the Milwaukee road at the time of his death and prior thereto, he had been for about some seventeen years. I think it may have been longer than that, but it was for a considerable number of years. He had been employed as a brakeman on freight trains most of the time, but he had finally passed the examinations and had been promoted and qualified as a conductor, but at the time in question he was acting as a brakeman. You will [fol. 9] understand that every man having been in the employ of a road and working up by passing the examinations for a conductor, or from fireman to engineer, that they don't always have a job ready for them and they still have to continue that work as brakeman or fireman, and Mr. Coogan at the time of his death was working as a brakeman. He was employed that day, the evidence will show you, as a hind brakeman on what is known as the defendant's freight train No. 92, that train was to run from Farmington in this county, to Austin, Minnesota. This train, the evidence will show you, was being made up in the yards at Farmington, on the 14th day of July, this year, and along sometime in the morning about seven o'clock this train was being made up by a road crew that was doing switching in the yards at Farmington in making up trains. Their run was from Minneapolis to Farmington, this crew that was doing

the switching in making up train 92. The conductor of that train that was making up train 92, was John Marshall, and there were employed under him two brakemen, Dubke and Odekirk. The evidence will show you that in the process of making up this train the first thing they did was to put a caboose in on what is known as track 1, in Farmington, and the evidence will show you that Mr. Coogan rode that caboose down track 1. The engineer of the road crew making up the train went in on another track and picked up two cars and kicked them in on track 1, cut off their engine and coupled them on to the caboose and when the cars were going back Dubke rode those two cars down, controlling their movements by [fol. 10] brakes, until he got them up against the caboose to couple on to the caboose by underneath coupling. In the meantime, the engine went in on another track and picked up I think about eight cars, came back and kicked those cars in on to the first two cars; that they then went and got two or three or four more cars and came back in and with their engine brought those cars against the seven or eight and coupled them on and that those cars constituted this train. The evidence will show you that when they had done that they then discovered that it was necessary to push this whole string of cars back in order to get a proper clearance at the switch; that they pushed those cars back about two car lengths and stopped and took off this engine and put on the road engine that was to pull the train out; when they put on the road engine the engineer attempted to pump up the air brake line but could not do so because he found there was an opening in the train somewhere. He sent one of the men back, and Dubke started back and as he got part way back he saw the body of Mr. Coogan lying back near the rear end of the train near one of the ties on this track 1. I don't think he went back there immediately, but I think the conductor of his train and the conductor of the crew making up the train were the first men to come over to where the body lay. The evidence will show you that among other things, it was the duty of Coogan to couple the air on this train that was made up on track 1. The evidence will show you that when his body was discovered that all the air had been [fol. 11] coupled on that train between the cars until you came back to the rear car, the coupling between the rear car and the caboose itself, the air hose at that point was not coupled and that is where the air was escaping. The air couplings were made on all the other cars. I don't know whether you understand what I mean by air hose, or not. These trains, both passenger and freight, are controlled by air brakes operated by the engineer in his engine. They have a pipe underneath all the cars, called the air pipe line. At the end of this pipe they have a large hose attached, about that long (indicating), and that hose comes up right at the side of the coupling apparatus. This is the coupler (indicating), and on the car ahead of you the hose will come out this side and the hose extend down, and on the other car the hose will come out on the other side of the coupler and extend down. You take hold of both and couple them together and that makes the connection. The evidence will show you that the coupling between the caboose and the first car was

made in that manner. We expect to show you also by evidence that his body was found—this track No. 1 on which the train was standing, runs east and west in Farmington and these operations of trains were made from the west to the east, in other words, that the caboose was clear at the east end of the train, and when they shot back two car lengths (the evidence will show you they shot back two car lengths), why when his body was found the evidence will show you that it lay outside of the south rail of the tie within a car length [fol. 12] and a half of the west end of the caboose, that is, his body would be a car length and a half west of the west end of the caboose after the caboose had been started. The evidence will show you also that his body was dragged for perhaps ten or fifteen feet. The witnesses may not exactly agree upon that, but anyway it was dragged some distance, probably ten or fifteen feet. In addition to that, the evidence will show you that the only place where there was any blood on that train was on the wheels on the south side of the first car next to the caboose and the rear wheel of the rear coupling under that car. The evidence will show you also that on this car the two wheels are pretty close together on the south side of the car and up the front end of the truck it is just the same, two wheels on each side. The evidence will show you also, that through the center of the wheel, of the rear wheel, the one next to the caboose where they found the blood on the side of the tread of the wheels, coming through the wheel on the south side is what is known as an oil box that extends outside the wheel; through that on from the first wheel continuing to the second wheel of this truck, and running below is what is called an arch bar. That arch bar is fastened by bolts projecting down through this oil box and in this case the bolt extended down through the nut and through that nut what is called a cotter pin projected. A part of his clothing, we will show you, was found on that bolt projecting down through and holding the arch bar of the first wheel next to the car coupled to the caboose. The evidence will also show [fol. 13] you that in this case, right about—right where the cars were standing before they shot them back two car lengths, right where they were standing before they were pushed back two car lengths and when his body had been dragged for ten or fifteen feet, that at that point and outside of the south rail, outside of the side of the south rail along the ties, there had been constructed in this yard what is known as an air pipe line, that is, a pipe that runs along that track perhaps in the neighborhood of a quarter of a mile. That may be too long, but it is quite a long distance. They had this air pipe line fastened down, normally it is supposed to be fastened close to the ties. That at that point about where those cars must have been standing before they were shot back two car lengths, this air pipe line had been torn loose, the fastenings that held it down had been torn loose for a distance of probably twenty-five feet; that air pipe line had been twisted out of shape at that point and was raised, some parts of it in some places, it was raised up from the ties as high as four and a quarter inches above the ties in some places and bent in toward the south rail of that track. The evidence will show you that at that point it was four or four and a half inches above the ties.

Along this place where that condition existed the track was not balanced up on the inside of that pipe line even with the ties. It was much lower and that the pipe line was bent in at that point so that it came within seven or eight inches of the rail. We expect to show you, and our theory of this case is, that it being his duty to couple the [fol. 14] air, that he had stepped in to make that coupling about the time or just before they started to move the cars back two car lengths, and while *we* stepped in, with one foot inside and the other out, that in some way his foot outside became caught under that pipe line and when the cars started his foot was caught and that is the manner in which he came in contact with the wheels and was caught. In support of that we will have the shoes he wore at the time, and they will show you a mark, probably not as plain now as it was at the time, but a mark along the side of the heel here (indicating), a depression in the shoe. Now, I have gone into this more in detail than I would if it were a case where we had witnesses who saw the accident. In addition, Mr. Coogan was a man thirty-nine years of age, earning, and we will show you by the bank book in which the checks issued to him for wages were credited, from the first of July, 1922, to the first of July, 1923, he was killed on the 14th of July, 1923, that for that one year immediately prior to his death he had earned over $2,500.00. We will show you about as near as we can what portion of that was contributed to the support of his wife and family. We will show you he left his wife, who is here in court with her six children, the youngest two and the oldest thirteen. That, I believe, is a very brief outline of what we expect to show.

By Mr. Erdall: Defendant makes a motion for judgment, for the reason that plaintiff's counsel in his opening statement has failed to [fol. 15] state any negligence on the part of the defendant or any of its agents or servants, in any way contributing to or causing the death of the deceased William Coogan; conceding that everything as stated to be true is the position of the defendant, that there was no actionable negligence shown on the part of the defendant, or its agents or servants.

The Court: Motion denied.

Exception by defendant.

By Mr. Sheehan: It is stipulated by and between the respective attorneys that freight train 92 of the defendant company, being made up at Farmington on the 14th day of July, 1923, and which train was to run from Farmington to Austin, Minnesota, and on which the plaintiff's decedent, William Coogan, was employed as rear brakeman, was engaged in carrying commerce from Minnesota to other states and was engaged in interstate commerce.

Plaintiff's Exhibit "A" marked by the reporter.

Mr. Sheehan: I offer in evidence Plaintiff's Exhibit "A," which is a certified copy of letters issued to Edith F. Coogan, as special administratrix.

By Mr. Erdall: No objection.

The Court: It may be received.

OTTO W. ENGELBERT, being called, was duly sworn and testified as follows on direct examination by Mr. Sheehan:

Q. Mr. Engelbert, your name is O. W. Engelbert?
A. Yes.
Q. You live here in Hastings?
A. Yes.
[fol. 16] Q. What official position, if any, do you hold?
A. Coroner of Dakota county.
Q. You remember the 14th day of July, this year, being called to Farmington?
A. Yes.
Q. In your official capacity as corner?
A. Yes.
Q. What did you find when you arrived there, Mr. Engelbert?
A. I found a railroad man by the name of William Coogan killed by the Milwaukee road.
Q. Do you know what track the train was on when you got there?
A. No, I don't exactly know. There were a number of tracks.
Q. What did you find there at the time, Mr. Engelbert, state in a general way?
A. I found the body of Mr. Coogan laying alongside of the track where they were making up the freight train.

By Mr. Erdall: Making up which train?

A. Where they had been making up the trains.

By Mr. Sheehan:

Q. Do you know what direction those tracks run there?
A. East and west.
Q. What kind of a train was this?
A. Freight.
Q. What kind of cars in it?
A. Mostly box cars.
Q. Was there a caboose?
A. Yes.
[fol. 17] Q. At which end of the train was the caboose?
A. The east end.
Q. On the east end?
A. Yes.
Q. Did you notice the car coupled to the caboose?
A. Yes.
Q. You took the number of that car at the time?
A. Yes.
Q. What was the number of that car?
A. No. 24060.
Q. 24060, is that right?
A. Yes.
Q. What were the initials?
A. C. I. W. N.
Q. Do you know how many cars there were in that train?

A. No, I did not count them.

Q. How in reference to the air couplings, had they all been made on that train?

A. All except the coupling between the caboose and the freight car, No. 24060.

Q. Where was his body at the time, on which side of the train?

A. The south side.

Q. And where was his body in reference to the south rail, or the ties extending out?

A. Just about outside of the ties.

Q. How was he laying, parallel or crosswise?

A. Parallel with the track.

Q. How far, and which way from the caboose was his body?

[fol. 18] A. West of the caboose.

Q. How far?

A. I should judge about a car length and a half.

Q. Did you examine the ground there to see if there was any evidence of his having been dragged or otherwise?

By Mr. Erdall: I object to the form of question on the ground that it calls for a conclusion from the witness and it is leading.

The Court: I think the objection is good in that respect. The witness cannot testify his body was dragged unless he saw it dragged; he can testify to what he saw.

Q. What did you see in that respect?

Mr. Erdall: Same objection.

The Court: Overruled.

Mr. Erdall: I move that the word "respect" be stricken from the answer unless he testifies to what he saw.

The Court overruled.

A. I saw the body lying alongside of the train, and I went back to see where the accident occurred and it looked as though the body was apparently dragged from about ten feet where he was run over.

Mr. Erdall: I move the answer be stricken; a conclusion.

The Court: That part of the answer as to where the accident occurred and the body being dragged may be stricken. Where it looks as though the body had been dragged may stand.

Q. What do you refer to when you say it looked as though the [fol. 19] body had been dragged; describe what the condition there showed?

A. By the blood, and the ground being kicked up where the body was dragged along.

Q. Where were those marks in reference to the south rail?

A. From the rail to where the body was.

Q. Outside or inside?

A. Outside.

Q. Did you examine the cars there that day?

A. Yes.

Q. What examination did you make of the cars?

A. I looked along the cars ahead of it and behind to see if there were any blood marks on the ground and I noticed that the car ahead of the caboose the wheels had blood spots and pieces of flesh of the body.

Q. By the car ahead of the caboose, do you mean the car coupled to the caboose?

A. Yes.

Q. And on what wheel of that car did you observe blood?

A. The wheel next to the caboose.

Q. On which side?

A. The south side.

Q. Did you find blood on any other of the wheels of the cars?

A. No, just that wheel and the wheel alongside of it.

Q. On what side of the wheel did you see the blood?

A. On the flange of the wheel and the side of it.

[fol. 20] Q. Did you examine the coupler between the caboose and the first car to see if there was any blood there?

A. There was no blood that I saw there.

Cross-examination.

By Mr. Erdall:

Q. Mr. Engelbert, about what time did you arrive at Farmington?

A. I have no record of the time, but I was called about eight A. M.

Q. And it took you about half an hour to get there?

A. It was not very long after I was called until I got out there.

Q. Sometime between eight and eight-thirty?

A. It was later than that.

Q. About what time would you say, Mr. Engelbert?

A. I should judge about nine A. M.

Q. Now, Mr. Engelbert, you testified that the ground appeared to be scuffed up and that was on the outside of the south rail?

A. Yes.

Q. And for a distance of about how far west of the body?

A. I should judge about ten feet.

Q. Did you make and observation as to whether or not there was any scuffing up of the ground any other place?

A. That is the only place I noticed any.

Q. I understand that after you got there you went along and examined the entire length of the train?

[fol. 21] A. Yes.

Q. And you found that the air was coupled between, or rather that it was uncoupled, between the caboose and the first car ahead of it?

A. Yes.

Q. And it was coupled up between all of the other cars?

A. Yes, sir.

Q. Was there, or was there not, an engine on that train at that time?

A. No.

Q. Do you know where the engine was?
A. Standing to the south of the train.
Q. On some other track?
A. On another track, yes.
Q. And as I understand it, Mr. Coogan was dead when you arrived?
A. He was, yes.

Redirect examination.

By Mr. Sheehan:

Q. Did you make an examination of his injuries?
A. Not a thorough examination. I know he was badly mangled.
Q. You don't recall what the injuries were?
A. No, I don't.
Q. Do you remember anything in reference to his face?
A. He was pretty badly cut up. That was the condition of his entire body.
Q. You don't remember the details, though?
A. No, sir.

[fol. 22] FRANK JEFFERS, being called, was duly sworn and testified as follows, on direct examination, by Mr. Sheehan:

Q. Mr. Jeffers, where do you live?
A. Austin, Minnesota.
Q. How long have you lived there?
A. About twenty-four or five years.
Q. What is your business?
A. Conductor, in the railway employ.
Q. On what road?
A. The Milwaukee.
Q. How long have you been employed by the Milwaukee?
A. Since October 3, 1901.
Q. And have you been all that time in the capacity of conductor?
A. No.
Q. How long have you been a conductor?
A. Since 1908.
Q. You are in the employ of the Milwaukee at the present time?
A. Yes.
Q. And you are conductor on freight trains?
A. Yes.
Q. You are a freight conductor?
A. Yes.
Q. And you were in July of this year?
A. Yes.
Q. Do you recall the 14th day of July, this year?
A. Yes, I remember something about it.
Q. Were you working that day?
A. Yes.

[fol. 23] Q. Where was your run to that day?
A. Between Farmington and Austin.
Q. Between Farmington in this county and Austin in Mower county?
A. Yes.
Q. What was the number of your train?
A. No. 92.
Q. Who were the members of your crew that day?
A. William Delhanty was one brakeman and Mr. Coogan was the other brakeman.
Q. You were the conductor?
A. Yes, sir.
Q. What time was your train due to leave Farmington that day?
A. Seven A. M.
Q. Where was your train, No. 92, made up?
A. On No. 1 track.
Q. In the Farmington yards?
A. Yes.
Q. Who was the conductor of the crew making up that train?
A. John Marshall.
Q. Do you know the members of his crew?
A. I think I do. He had Dubke for one and Murphy was the other brakeman.
Q. What was the first movement made in the making up of that train, that you know of?
A. Kicking the caboose down on No. 1 track.
Q. That is your caboose?
A. Yes.
Q. Who rode that caboose in, if you know?
[fol. 24] A. I think Mr. Coogan rode the caboose down and stopped it.
Q. How did he stop it?
A. By hand brakes.
Q. What was the next movement, as you recall it, in making up that train?
A. Well, if I remember right, there was two cars kicked in onto the train first.
Q. Just what would be the movement; do you know where they got those two cars from?
A. Outside of the yards some place.
Q. Was it your engine that was coupled on to those cars to take them out?
A. No.
Q. Whose was it?
A. It was the yard engine that they used.
Q. That would be the engine being used by Mr. Marshall's crew?
A. Yes.
Q. Just what would be the movement when they would come back with that engine that would couple on those two cars?
A. Those cars were kicked in from the lead track.
Q. When and where?

A. They would be put in from above the leading switch.
Q. And they then kicked those two cars in, you say?
A. Yes.
Q. What do you mean by that?
[fol. 25] A. They cut them off and let them go; ride them down.
Q. Do you know who rode them in?
A. I think Mr. Dubke.
Q. And how far in would he ride the cars?

By Mr. Erdall: I object to the form of the question on the ground that there is no foundation laid and it is immaterial how far he would ride them.

The Court: If the witness knows of his own knowledge, he may answer. Otherwise, the objection is sustained.

Q. Do you know whether they were coupled or not on to the caboose?

A. I imagine he rode them down until they were coupled on to the caboose.

Mr. Erdall: I ask that answer be stricken.
The Court: It may be stricken.

Q. Will you tell what the usual practice is in that yard and every yard, in making up trains of that kind, when a man rides the cars in?

Mr. Erdall: We object to that question. It does not come within the pleading in this case.
The Court: Sustained.

Q. In making up trains—what does that mean when two cars are cut off and kicked in? What is done with the cars?
A. That is part of their duty to make up a train, to cut the cars off.
Q. What is there further to do after the cars are cut off?
A. They know when they cut the cars off they take care of them.
Q. And how do they take care of them?

[fol. 26] Mr. Erdall: Objected to as immaterial.
The Court: Sustained.

Q. What is the next movement with that engine in making up that train?
A. I could not say exactly.
Q. Do you know how many cars were taken out and put in on that train?
A. I imagine it was somewhere along five or six; somewhere along there.
Q. Did you check the cars as they came out?
A. Not at the time they were switched.
Q. You checked them after?
A. I got the list after they were made up.
Q. How many cars were in the train?
A. Seventeen, if I remember right, outside of the caboose.

Q. Have you a list of them?
A. No, I have not.

Mr. Erdall: I have a list here, Mr. Sheehan.
(Mr. Erdall hands list to Mr. Sheehan.)

Q. Where were you when this train was being made up?
A. At the west end of the yards.
Q. Whereabouts were you in reference to the switch leading to track 1?
A. I possibly was three or four car lengths from there. I could not say exactly.
Q. Did you see the last movement they made when they coupled on the last cars?
A. I don't remember what moves were made.
Q. After the train was made up what was done with the engine
[fol. 27] of the crew that Mr. Marshall was conducting?
A. It went to some portion of the yard, I could not say where.
Q. Did they take the engine off?
A. Cut it off.
Q. And was your engine put on?
A. Yes.
Q. Were you there when it was put on?
A. I was along the lead in the west end of the yard.
Q. Do you know where you were?
A. I could not say exactly at present.
Q. How far from the engine were you?
A. I could not say exactly, probably three or four cars, maybe closer.
Q. Do you know what was done when they coupled your engine on?
A. I could not say exactly.
Q. You were not there—what do you mean, you could not say exactly?
A. I could not say exactly just what moves were made.
Q. Do you know whether the engineer tried to pump up the air of that train?

Mr. Erdall: I object to that—calling for a conclusion of the witness.
The Court: Overruled.

A. I could not say as to that at that time.
Q. Do you remember seeing anyone leaving the front end of the train and going toward the rear of the train?
A. I don't remember just exactly.
[fol. 28] Q. Do you remember anything about what Dubke did?
A. No, I don't think I could see at the time.
Q. Do you know where you went after the engine was put on?
A. If I remember right, I went to the engine.
Q. To your engine?
A. Yes.

Q. Immediately after it was put on?
A. I could not say immediately.
Q. Had there been any movements of wour engine after it was put on that you noticed before you went to the engine?
A. No.
Q. And after you went there what did you do then?
A. I could not say exactly.
Q. Did you leave the vicinity of the engine?
A. Not just at that time.
Q. Did you shortly after?
A. I possibly did.
Q. Don't you know whether you did or not?
A. Very likely I did, but I could not say just at that time.
Q. You must have, didn't you?

Mr. Erdall: I object to that: it is cross examination of his own witness.
The Court: Overruled.

A. I possibly did.
Q. You are not there yet?
A. No.
[fol. 29] Q. Who was the first man to reach the body of William Coogan?

Mr. Erdall: That is objected to as calling for a conclusion.
The Court: If he knows he may answer.

A. As near as I know, Brakeman Dubke was the first man who discovered him.
Q. That discovered him?
A. Yes.
Q. How far from the body was Dubke when he discovered him?

Mr. Erdall: That is objected to on the ground that there is no foundation laid.
The Court: If he knows.

A. I could not say that. I was not there with him when he discovered it.
Q. Did Dubke go over to the body before you did?
A. He must have.
Q. Who were the first men there?
A. Dubke must have been.
Q. Must have been; did you go over to the body?
A. I did after he hollered. He was back that way and hollered something to me.
Q. You saw him when he hollered?
A. I probably did. I heard it.
Q. And you probably saw him?
A. Yes.
Q. Don't you know whether you did or not?
A. I knew I heard him.

Q. Do you know whether you saw him or not?
A. I am quite sure I saw him.
[fol. 30] Q. Which side of the train was he on?
A. On the south side.
Q. And where were you?
A. I was on the south side of the train, near the head end, possibly near the engine. I might have been back a ways.
Q. Who was with you at that time?
A. I could not say exactly, unless the head brakeman.
Q. Did anybody go to the body with you?
A. I could not say exactly. There was possibly some one not far off from me.
Q. Where was John Marshall?
A. I could not say at that time. He was not very far behind me.
Q. Were you and he walking back along the track when your attention was called?
A. I think Marshall——
Q. And did Dubke stop and did not go back and you and Marshall walked over there?
A. I could not say; he hollered and I went back.
Q. And Marshall went with you?
A. I think Marshall was somewhere near me.
Q. And you practically got there at the same time, you two?
A. Possibly somewhere near it.
Q. Dubke had reached the body at that time, had he?
A. I could not say.
Q. You don't remember of his being there at the body?

Mr. Erdall: I object to that; it is cross examination of his own [fol. 31] witness.
The Court: He is entitled to leading questions. Overruled.

Q. You don't remember of his having reached the body at the time you and Marshall went over there?

Mr. Erdall: I object to that as leading, and also cross examination of his own witness.
The Court: Overruled.

A. I don't remember of his being there at the time.
Q. You don't remember of his being there?
A. No, not at that time.
Q. When you got over there to the body, where was it lying?
A. On the south side of the track.
Q. On the south side of track No. 1?
A. Yes.
Q. Where in reference to the ties of that south rail?
A. He was laying on his back south of the ties.
Q. Was he on the ties, or close to them, or not?
A. I could not say just exactly how close he was. He was south of the rail.
Q. And which direction was he from the caboose?

A. West, that is in that yard.
Q. The directions run east and west through that yard?
A. I think they do.
Q. You call them east and west?
A. At that place, yes.
[fol. 32] Q. The caboose was on the end of the train?
A. The east end.
Q. And his body was west of the west end of the caboose?
A. Yes.
Q. How far was his body west of the west end of the caboose?
A. Pretty close to two cars, if I remember right; something like that, maybe a car and a half.
Q. For one and a half or two cars he would be opposite the center of the second car from the caboose, is that correct?
A. Possibly. I say one and a half or two; I would not say just exactly what place he was laying.
Q. How was his body; was it across at right angles to the rail or parallel?
A. Kind of parallel like; kind of cater-cornered.

By Mr. Erdall: Cater-cornered?

A. Kind of northeast and southwest, I imagine it would be at that place. His feet were laying toward the caboose and his head toward the west.
Q. He was doubled up somewhat, was he not?
A. No, his body, as near as I noticed, he was on his back.

By Mr. Sheehan:

Q. Did you notice the ground immediately west of his body?
A. Not in particular, only I could notice where he had been dragged a little bit. It looked as though he had been.
Q. About how far did it appear he had been dragged?
[fol. 33] A. Eight or ten feet, I should judge.
Q. Did you examine the wheels on any of the cars to see if there was any blood?
A. If I remember right we examined the rear wheel of the rear car.
Q. Did you find anything on that wheel, blood?
A. We discovered blood on the flange of the rear wheel.
Q. Was there any blood on the outside of the wheel?
A. I don't remember.
Q. What wheel was that?
A. It was the rear wheel of the rear car, the east wheel next to the caboose.
Q. The car coupled to the caboose?
A. Yes.
Q. Did you find blood anywhere else on the train?
A. I could not say I noticed any.
Q. That is the only place you noticed blood?
A. Yes.

Q. There were oil boxes on that train, were there not?
A. I suppose there were.
Q. Don't you know?
A. There must have been.
Q. Don't you know?
A. Yes, there were oil boxes on the car.
Q. The journal comes through the wheel projecting a little out of the south side, and on the journal there are oil boxes?
A. Yes.
[fol. 34] Q. About seven or eight inches wide?
A. I should imagine about that.
Q. Maybe ten?
A. Yes.
Q. They may be?
A. Eight or ten inches long.
Q. And on both wheels?
A. Yes.
Q. There are arch bars running from those?
A. Yes.
Q. Fastened to the bolts of the oil box?
A. Yes.
Q. And there are bolts projecting each side of each oil box?
A. Yes.
Q. And down through the nuts on the lower part of the bar?
A. Yes, they would have to be.
Q. And on this car it was that way?
A. Yes.
Q. And on the rear wheel?
A. Yes.
Q. And there is a cotter pin——
A. I did not notice, I could not say as to a cotter pin.
Q. Did you notice that bolt?
A. Yes.
Q. What was on it?
A. There was cloth hanging on it.
Q. What kind of cloth?
A. I could not say exactly.
Q. Was it the same color as his shirt?
[fol. 35] A. I could not say as to that. I did not look at it close. I could see it hanging there.
Q. And it was a part of the cloth from his shirt, was it?

By Mr. Erdall: I object to that as calling for a conclusion.
The Court: If he knows, he may answer.

A. I could not say whether it was from his shirt or not.
Q. What did it appear to be to you at that time?
A. It appeared to be some part of his clothing.
Q. Did you notice anything else there along the track; did you notice where his hat was?
A. Yes.
Q. Was it a hat or cap he was wearing?

A. A hat.
Q. Where was that?
A. It was found in between the second and third rear car in the center of the track.
Q. It was found between the second and third cars?
A. The rear cars.
Q. Was it between those cars or under one of them?
A. It was just about between the car, under the draw bars.
Q. Not under the body of either car?
A. No, inside of the wheels.
Q. Did you find anything else there?
A. His false teeth were found in there.
Q. Was there anything else, just inside of the rail, up close to it?
[fol. 36] A. If I remember right, some part of his flesh; the lower part of his jaw.
Q. What was the condition of his face, the lower part of his jaw?
A. That was the most particular part I noticed when I first saw him. He was lying on his back.
Q. What about that?
A. It looked as if the whole lower part of his face was gone.
Q. It was smashed off?
A. It was taken off from under his nose.
Q. You did not notice the wounds on his body, I presume?
A. No.
Q. Was that train moved any way after the body was discovered until the coroner arrived?
A. No.
Q. Do you know what an air pipe line is?
A. I imagine I do. There are different kinds, I suppose.
Q. This track No. 1, did it have an air pipe line along it?
A. Yes.
Q. Where was that air pipe line located in reference to track No. 1, on which side of the track?
A. On the south side.
Q. You have been running out of Farmington for some time prior to that?
A. Yes, sir.
Q. For how long?
A. I have run out on that run for a short time before that but I run through Farmington for quite a few years. Ever since the [fol. 37] yards are built in there.
Q. Were they using that air pipe line at this time for any purpose?

By Mr. Erdall: That is objected to as immaterial.
The Court: Overruled.

A. I don't think so. I don't know.
Q. What is the purpose of an air pipe line?
A. Testing the air in cars after the trains are made up.

Q. With the aid of an engine?
A. As a rule.
Q. When was that yard abandoned as a yard and the yardmaster and other employees taken from there?

By Mr. Erdall: That is objected to as calling for a conclusion; no foundation laid.
The Court: Sustained.

Q. Is there a yardmaster at Farmington?

Mr. Erdall: That is immaterial.
The Court: Overruled.

A. No.
Q. How long since they have had a yardmaster there?
A. I could not say.
Q. Do you know how long since they have had one there?
A. Possibly two or three years.
Q. Have they had any other employees there that are usually had in yards where they have a yardmaster, since that time?

[fol. 38] Mr. Erdall: May it be understood that to all questions along this line we interpose an objection and exception? We object to Mr. Sheehan's remarks about the conditions there.
The Court: Sustained.

William Dubke, being called, was duly sworn and testified as follows:

By Mr. Sheehan:

Q. Mr. Dubke, your name is William C. Dubke?
A. Yes.
Q. You are a railroad man?
A. Yes.
Q. And are working for the Northwestern now?
A. Yes.
Q. Where were you working on the 14th of July, 1923?
A. At Farmington.
Q. For what road?
A. The Milwaukee.
Q. Were you employed in the yards there that day that Mr. Coogan was killed?
A. Yes.
Q. Who was your conductor?
A. Marshall.
Q. John Marshall?
A. Yes.
Q. Who was the other man working with you?
A. His name was Murphy.
Q. What position did you have on that train; were you the head or rear brakeman?

[fol. 39] A. I was the rear brakeman.

Q. Did you have anything to do with making up this train No. 92?

A. Yes.

Q. Do you remember when he caboose was put in on track 1?

A. Yes.

Q. Do you remember who rode that caboose in?

A. I suppose the 92 crew rode that in.

Q. What individual; what man, if you know?

A. I don't know.

Q. In making up a train what is the first movement made there?

A. The first thing we did is to kick the caboose down No. 1 track.

Q. Then what was the next movement, Mr. Dubke?

A. We went on with our work whatever the rest of it was.

Q. What was the next work?

A. Making up the train.

Q. By that what do you mean, getting hold of some cars?

A. Yes.

Q. And putting them in on the track?

A. Yes.

Q. And you get hold of some cars and put them on the track, put them in on that track, with that engine?

A. We get cars out of the yard and start them up the track.

Q. How many cars did you get first?

[fol. 40] A. I don't know.

Q. How were they put in, in on that train?

A. The first cut was two cars. I rode them.

Q. You rode them down?

A. Yes.

Q. What did you do with them?

A. Coupled them on to the caboose.

Q. On what car were you?

A. On the rear car.

Q. That would be the car at the end where it coupled on to the caboose?

A. Yes.

Q. You mean by that, that you would be at the front end in the way in which they were going?

A. Yes.

Q. And what way, if any, was there of regulating the speed?

A. I was on top and had control of them.

Q. How did you have control of them?

A. By hand brakes.

Q. Did you couple those two cars on to the caboose?

A. Yes.

Q. How many cars were in the next cut?

A. Five, if I am not mistaken.

Q. Who rode them in?

A. I did.

Q. Did you couple those on to the cars that had already been coupled?

A. I rode them down and saw that they were not going to couple on very hard and I cut off.

[fol. 41] Q. You coupled them on to the other cars, did you?

A. Yes.

Q. When you had the speed regulated about right, you say you regulated the speed by hand brakes?

A. Yes.

Q. Then you cut off?

A. Yes.

Q. Then what?

A. Got some more cars.

Q. How many did you couple on then?

A. Ten, I think.

Q. Did you ride them in?

A. Yes.

Q. At the front end of them?

A. Yes.

Q. Did you couple them on to the other five?

A. I rode them down until I saw they were not going to hit hard and I cut off. I did not ride to the coupling.

Q. How many cars did you ride down?

A. Maybe a car length or two.

Q. Then what did you do?

A. Helped the rest of the boys finish up.

Q. Did you put in any more cars?

A. I think that is all there were.

Q. You did not have anything to do with coupling the air up at that time?

A. No.

Q. As soon as you got off one cut you walked back west to meet the next cut?

A. Yes.

[fol. 42] Q. Were you there when they put the road engine on?

A. Yes.

Q. What did the engineer do with reference to pumping up the air line?

A. I don't know what you mean.

Q. You don't know what it means to pump the air up?

A. I had to couple on first.

Q. Did they try to pump up the air line?

A. Yes.

Q. What did he find?

A. About, maybe four cars from the engine, the air hoses were not coupled on. I went to couple them.

Q. Did you couple them?

A. Yes.

Q. Where was that?

A. I should judge it must have been about the fourth one from the engine. Somewhere in there.

Q. Did you see the body of William Coogan?

A. I got about five or six car lengths from him when I was walking down to couple the air, before I saw the body.

Q. You saw the body when you were five or six car lengths away?
A. Yes.
Q. What did you do then?
A. Motioned for the rest of the crew to come down.
Q. Did you go up to the body?
[fol. 43] A. I got as far as to see who it was. I did not stop.
Q. How far from the body were you when you could see who it was?
A. Three or four feet.
Q. Did you stay there then?
A. No.
Q. You walked away?
A. I motioned for the rest of the crew to come down and see what happened.

Cross-examination.

By Mr. Erdall:

Q. Mr. Dubke, you say that the road engine was coupled on to the train and then you went down along the train to see about this car that was leaking; that was about four cars from the engine?
A. Somewhere in there.
Q. Was it your duty to couple up the air?
A. No.
Q. Whose was it?
A. The head brakeman of the road crew.
Q. Who was the head brakeman?
A. Mr. Delhanty.
Q. How did it happen that you coupled up the air?
A. I did it for him for a favor. I did not have to do it.
Q. You coupled up the air about four cars from the engine; did you couple any other cars?
A. I might have, one or two of them.
Q. What is your recollection as to what you did; did you couple up more than one?
A. Yes.
[fol. 44] Q. Do you know how many there were?
A. No, I don't.
Q. What is your best estimate as to the number of cars you did couple up the air on?
A. Two or three of them.
Q. And did you take any particular notice as to just how far from the body you were when you first saw him?
A. About five or six car lengths when I noticed it.
Q. Did you notice what cars were opposite so that you would know you were five car lengths?
A. No.
Q. In other words, you may have been four or seven car lengths, is that correct?
A. Yes.

Q. So that it is just a guess on your part as to the distance you were from the body, when you say five or six?
A. Yes.
Q. Mr. Dubke, when you picked up the cut of five cars and the cut of ten cars and the cut of two, do you know whether the air was coupled on those cars at that time?
A. No.
Q. It is sometimes coupled?
A. Sometimes, when they are shot in——
Q. But you don't know whether the air was coupled on those particular cars when they were shot in or not?
A. No.
Q. When did you last see Mr. Coogan alive?
[fol. 45] A. When I rode the first cut down.
Q. Where was he then?
A. Standing next to the caboose.
Q. You had known him for some time?
A. Two or three months.
Q. And did you say anything to him; pass the time of day?
A. We were kind of joking together for a few minutes.
Q. Did you see anything of him from that time up to the time you discovered his body, at any time?
A. No.

Redirect examination.

By Mr. Sheehan:

Q. It is part of the duty of the road crew to couple the air on those cars, is it?
A. I don't know. I suppose it is. It is their train.
Q. That is what you understood by it?
A. Yes.

L. N. GEPHART, being called, was duly sworn and testified as follows:

By Mr. Sheehan:

Q. What is your name?
A. L. N. Gephart.
Q. What is your business?
A. Furniture and undertaking.
Q. Where is your home?
A. Lakeville.
Q. Where is your place of business?
[fol. 46] A. Lakeville.
Q. In Dakota county?
A. Yes.
Q. As undertaker, did you have charge of the body of William Coogan?

A. I did.

Q. Who was killed on the 14th day of July this year, at Farmington?

A. Yes.

Q. Did you go over there to pick up his body?

A. Yes.

Q. Who went with you?

A. Mr. Regan.

Q. Was the train standing there on that track beside his body?

A. It was.

Q. About what time did you get over there that day?

A. I don't remember. Some time in the forenoon.

Q. Where did you find his body?

A. Just outside of the rail of the track.

Q. Which side of the track?

A. The train was facing west and he was laying on the left-hand side.

Q. That would be the south side?

A. Yes.

Q. Did you notice the caboose and cars coupled to it?

A. I did at the time.

Q. Do you know about opposite what car his body was laying?

[fol. 47] A. I think it was about the third car from the caboose.

Q. That is your recollection of it at this time?

A. Yes.

Q. And how was his body laying, at right angles or paralld with the track?

A. It was parallel to the track.

Q. Did you notice any of the cars as to whether they had blood on them?

A. Yes, I looked at them at that time.

Q. Do you recall at this time on what part of the car you found blood, if any?

A. Everything was on the left-hand side of the car, but just where I cannot say now.

Q. What was it on, the wheels or the body?

A. On the wheels of the trucks.

Q. On the left-hand side?

A. Yes.

Q. Do you remember what car that was?

A. I could not say now.

Q. Did you see his hat around there?

A. I don't remember.

Q. Did you see any part of his body or any part of his person that had been detached from his body?

A. Yes.

Q. Where?

A. We picked up some small pieces inside of the rail.

Q. Inside of the south rail?

A. Yes.

Q. What were those pieces?

[fol. 48] A. We picked up the tongue and he had a bridge in his mouth that w[illegible]icked up, and there were several other small pieces. I don't remember just now.

Q. Where were they in reference to the south rail?

A. Right close to the south rail.

Q. Inside of the rail?

A. Inside, yes.

Q. Did you see any part of his clothing anywhere there, on the ground or attached to any of the cars?

A. It seems to me there was, but I don't remember.

Q. You have no definite recollection in reference to that?

A. No.

Q. Did you and your assistant take the body to Lakeville?

A. Yes.

Q. And prepared it for burial?

A. Yes.

Q. Did you strip the body?

A. Yes.

Q. What injuries did you find on his body at that time?

A. I don't remember exactly what they were. I remember that parts of his body were badly mashed. I put a plaster paris cast on one leg and one arm. That was the left leg and the left arm. His face was gone from here down (indicating).

Q. His face was gone from here down, you say, and you draw your finger from the nose outward?

[fol. 49] A. I think so.

Q. Was his face from the nose gone on both sides?

A. Yes.

Q. You took the clothing from his body?

A. Yes.

Q. What did you do with it?

A. Burned all but the shoes.

Q. What did you do with the shoes?

A. Put them in the garage.

Q. What did you do with them after that?

A. Left them there for a little and you came and got them.

Q. Whom did you give them to?

A. You and another gentleman.

Q. Was Mr. Goodwin there at the time?

A. Yes.

Q. That was about two days after you sent the body back, was it?

Mr. Erdall: That is objected to as leading.

Mr. Sheehan: I will withdraw the question.

Q. How long after you shipped the body?

A. Yes, to Austin.

Q. How long after that was it when you gave me the shoes?

A. It seems to me it was quite a while. I don't remember definitely.

Q. Have you seen those shoes since that time?

A. No.

Q. Do you remember those shoes?
A. I think I would. I could not swear to the shoes.
[fol. 50] Q. Tell the court and jury anything you remember about those shoes, the size, or anything that you remember that is descriptive of them at that time.

Mr. Erdall: That is objected to unless confined to a description of the shoes at some particular time.
The Court: I think it should be confined to their condition as they appeared at the time the body was picked up.

Q. Where did you keep the shoes after you took them from the body?

Mr. Erdall: That is objected to as repetition.
The Court: Sustained.

Q. Where is the garage?
A. The garage is part of the store; it is built on to the store.
Q. Is it the basement?
A. The basement door goes through the garage.
Q. After taking them from the body at that time and place, you put them in the garage?
A. Yes.
Q. Were they taken from that place or anything done with them until you delivered them to me?
A. No.
Q. Or any change made in them?

Mr. Erdall: That is objected to on the ground that there is no foundation laid.
The Court: Overruled.

A. Not that I know of.

Mr. Erdall: I move that the answer be stricken out as a conclusion. There is no foundation laid——
[fol. 51] not showing that the witness knows the condition of the shoes at the time they were put in the garage.
The Court: Motion denied.
Mr. Erdall: Exception.
The Court: Note an exception.

Q. Now, I ask you to describe the shoes at the time in a general way; not as to marks or anything of that kind, but what kind they were as you recall them.
A. They were in good shape. We have a lot of bums that go around to the undertakers and gather up shoes and that is the reason I told the man that we would have to keep them. The shoes were in good shape and we put them in the garage at the time and never thought of them. It was a brown pair of shoes; heavy soled shoes and not very large.
Q. Do you think you would recall those shoes, if you saw them?
A. I think I would. I don't know.

(Mr. Sheehan produces shoes from bag.)

Q. I will ask you to examine those shoes.

(Witness examines shoes.)

Q. What do you say as to that being the pair of shoes?
A. It looks like them.
Q. At the time you gave those shoes to me was your attention called to anything in connection with the shoes?

Mr. Erdall: We object to that as immaterial.
The Court: Overruled.
Mr. Erdall: Exception.

[fol. 52] A. Yes, you said there was a mark on the counter of on shoe, and you said, "Look at that."
Q. Did I show it to you?
A. Yes.
Q. I called your attention to the left shoe, the outside of the counter above the heel?
A. I don't remember which shoe it was.
Q. Was it a mark of that character?
A. It looks like it.

Cross-examination.

By Mr. Erdall:

Q. Mr. Gephart, you say those shoes had been in the garage for some little time?
A. Yes.
Q. Before Mr. Sheehan came and called for them?
A. Yes.
Q. And the first time you noticed those marks on those shoes was when Mr. Sheehan called your attention to it?
A. I never noticed it before, but I did not pay any attention to it
Q. That is the first time you had any recollection of seeing this mark on the counter of the shoe was when Mr. Sheehan called your attention to it?
A. Yes.
Q. Do you keep a car in the garage there?
A. Yes.
Q. Where did you keep the shoes in the garage, on the floor?
A. I cannot say exactly.
Q. There was no particualr attention paid to the shoes during the [fol. 53] time they were in the garage?
A. No.
Q. What else do you keep in your garage?
A. Well, very little else. We have a truck we keep in there, a delivery truck and packing that we use for furniture. Sometimes there are boxes put in there, but not very often.
Q. Have you any personal recollection of the condition of those shoes at the time they were taken off Mr. Coogan's body?

A. No.

Q. And you don't know whether they are in the same condition now as they were at that time or not, do you, Mr. Gephart?

A. I am not positive.

By Mr. Erdall: At this time the defendant moves to strike all testimony of this witness bearing upon the condition of the shoes.

The Court: Motion denied.

Mr. Erdall: Exception.

Redirect examination.

By Mr. Sheehan:

Q. Do you know of any change in the condition of the shoes from the time or did you notice at the time you gave them to me any change in the condition of the snoes at that time from what they were when you removed them from his body?

Mr. Erdall: That is objectionable—calls for a conclusion of the witness.

The Court: Overruled.

Mr. Erdall: Exception. It is also repetition.

A. No.

[fol. 54] J. J. REGAN, being called, was duly sworn and testified as follows, on direct examination, by Mr. Sheehan:

Q. Where do you live, Mr. Regan?

A. Lakeville.

Q. Were you assisting Mr. Gephart on the 14th day of July this year when Mr. Coogans body was removed from Farmington to Lakeville?

A. Yes.

Q. Did you go down there with him?

A. Yes.

Q. Do you recall now where his body was when you got there?

A. I do.

Q. Where was it?

A. On the south side of the track, just outside of the rail.

Q. Was the train standing there on the track?

A. It was.

Q. How was the body, parallel or at right angles to the track?

A. Parallel with the track.

Q. Which way from the caboose was the body?

A. West.

Q. About how far west was it?

A. About three car lengths from the caboose.

Q. Did you observe the train there that day to see if there was any blood on it?

A. I did.

Q. Did you notice any blood?
A. Yes.
Q. On what part of the train?
[fol. 55] A. On the first car ahead of the caboose.
Q. On what part?
A. The south side of the trucks.
Q. You mean the wheel?
A. Yes.
Q. Did you notice any part of his person that had been detached?
A. A piece of his shirt.
Q. Where was that?
A. On the lower part of the car.
Q. On what part?
A. I should judge on the beam, the lower part of it, on the bottom beam.
Q. On the south side?
A. Yes.
Q. That is where you recall it was at that time?
A. Yes.
Q. Did you notice any part of his person, any of his flesh or teeth?
A. Yes.
Q. Where?
A. Out where the body was found aside of the track, about a foot or so.
Q. Aside the rail?
A. Yes, about a foot, I should judge, from the rail.
Q. Were you there at Lakeville when the body was taken care of?
A. I was.
Q. Did you notice what his injuries were?
A. I did. His left leg was badly mashed, or it had been broken [fol. 56] in three or four places, his face was cut from here down (indicating); his little finger was cut off of his left hand.

Cross-examination.

By Mr. Erdall:

Q. Were you and Mr. Gephart the only ones who took care of the body of Mr. Coogan?
A. I guess his man was there.
Q. Who is that?
A. A fellow that works for him.
Q. What is his name?
A. White.
Q. Did you notice when you first saw the body as to whether it was parallel with the track or was it in a little bit of an angle?
A. No, it was right with the track.
Q. It was right parallel with the track?
A. It might have been out a trifle.
Q. Would you say the head was further from the track than the feet?
A. I could not say exactly now.

R. I. Odekirk, being called, was duly sworn and testified as follows, on direct examination, by Mr. Sheehan:

Q. Your name is R. I. Odekirk?
A. Yes.
Q. Where do you live?
A. 2101 South Lyndale, Minneapolis.
Q. How long have you lived in Minneapolis?
A. About four years this last time.
Q. What is your business?
A. Switchman.
[fol. 57] Q. Are you employed as a switchman now?
A. Yes.
Q. For what road?
A. The M. and St. L.
Q. For what railroad were you employed on the 14th day of July, 1923?
A. The Milwaukee.
Q. What was your work?
A. I was employed as a brakeman.
Q. What was your run at that time?
A. Between South Minneapolis and Farmington.
Q. Where were you the morning of the 14th day of July, 1923?
A. We were in Farmington.
Q. And in what work were you engaged that morning?
A. Making up trains. There were three locals that we made up there every morning.
Q. You made up three locals that morning?
A. Every morning.
Q. Was that part of your work to make up trains in Farmington every morning in addition to pulling a train from South Minneapolis to Farmington?
A. Yes.
Q. How far is it from South Minneapolis to Farmington?
A. I believe we draw twenty-nine miles.
Q. This morning of July 14th, you say you made up three local trains?
A. There were three locals to be made up there every morning.
[fol. 58] Q. Did you assist in making up the freight train known as No. 92?
A. I did.
Q. Who was the conductor of your crew?
A. Marshall.
Q. John Marshall?
A. Yes.
Q. Who was the other brakeman?
A. Dubke.
Q. Do you remember the engineer and fireman?
A. I don't recall their names. I know them by sight.
Q. And of the three trains made up locally by your crew that morning which was this train 92, the first, second or third?
A. The first to go out of there.

Q. Had you made up any of the others before that?
A. No, we had not.
Q. What time was that train due out of there?
A. Seven A. M.
Q. On what track was this train made up that morning?
A. One.
Q. In what direction do those tracks run?
A. East and west.
Q. And from the north, beginning at the north, what is the first track, the northerly track?
A. No. 1 is next to the main line.
Q. What is the first track?
A. The main line.
[fol. 59] Q. And No. 1 is the first track south of the main line?
A. Yes.
Q. And there were a number of other tracks in the yard?
A. Yes.
Q. South of that?
A. Yes.
Q. What was the first operation of your engine in making up that train that morning?
A. We got the caboose and put it on No. 1 track.
Q. Did you go back with the engine attached and couple to it until it was stopped?
A. No.
Q. How was that done?
A. It was kicked on to No. 1 track.
Q. Do you know who rode that in and stopped it?
A. Mr. Coogan.
Q. And what was the next movement in the making up of that train?
A. We got two or three cars and put them on.
Q. You got them from some other tracks, did you?
A. Yes.
Q. And you put them on; by that you mean——
A. They were also cut off and allowed to run down this track.
Q. Down No. 1?
A. Yes.
Q. For the purpose of doing what with them?
A. That was the rear end of the train.
Q. Were they to be coupled on to the caboose?
[fol. 60] A. Yes.
Q. When those two cars were sent back in, did anybody ride them in?
A. Yes.
Q. Who?
A. Mr. Dubke.
Q. What was the next movement?
A. We got another bunch of cars, seven or eight, I don't just remember, and they were put in the same way.

Q. By kicking them in?
A. Cutting them off.
Q. Did Dubke ride them in?
A. Yes.
Q. He was the rear brakeman?
A. Yes.
Q. And you were the head brakeman?
A. Yes.
Q. You were following the engine?
A. Yes.
Q. The second cut was about seven or eight cars?
A. As close as I can remember. It might have been more.
Q. You could not say accurately?
A. No, maybe there were nine.
Q. After doing that did you get another cut of cars?
A. Yes.
Q. How many?
A. I thought it was about three, perhaps four.
Q. That is your recollection of it?
A. Yes.

[fol. 61] Q. What was done with those cars; were they put in the same way?
A. No, they were put in, but we had to shoot to clear the lead.
Q. Did you detach your engine from them?
A. Not until we cleared the lead.
Q When you brought them back and attached them to the other string did they stop?
A. We stopped to see if they were all together.
Q. What did you do?
A. Shoved to clear the lead.
Q. About how far did you shove?
A. I could not say, perhaps one and a half or two cars.
Q. What was done with your engine?
A. We went on with making up another local, I don't remember which.
Q. Your engine was uncoupled?
A. Yes.
Q. What was done with the road engine?
A. It was put on No. 1 track.
Q. Were you there?
A. I was there in the lead.
Q. Right near there?
A. Right at the switch, if I remember right.
Q. How far would that be from the engine?
A. It is half the length of the engine, right off the head.
Q. When the road engine was put on, what was done?
A. The air was cut in on the engine by the lead brakeman, I believe.

[fol. 62] Q. The air cut in on the engine, what do you mean?
A. The air hose were coupled up on the head car and the engine.
Q. What was done then?

A. Mr. Dubke, I believe, walked back and made an air coupling in the train a ways, two or three or four car lengths.
Q. Did they try to pump up the air line before that coupling was made?

Mr. Erdall: That is objected to on the ground that there is no foundation laid.
The Court: If he knows he may answer.

A. The air could not be pumped up.
Q. Did they try to?
A. They undoubtedly cut it in for that purpose.

Mr. Erdall: I ask that that be stricken, as a conclusion on the part of the witness.
The Court: It may be stricken.

Q. After the air was cut in as you explained it, by the coupling between the first car and the engine, did you notice anything about air escaping anywhere?
A. We could see the air blowing through.
Q. Who made that coupling?
A. Mr. Dubke.
Q. That was back three or four car lengths from the engine?
A. Yes.
Q. Was that the cut you had just put on?
A. I believe it was.
Q. After that coupling was made by Dubke, did you notice the [fol. 63] air escaping in any other part of the train?
A. Yes.
Q. Where?
A. The rear end of the train.
Q. What was done then?
A. Dubke walked back to make this coupling, I suppose, and he discovered——

Mr. Erdall: I move that be stricken, "I suppose"—he started for the rear of the train and he discovered Coogan.

Q. After he discovered Coogan did the other members of the train go back there?
A. Yes.
Q. Did you see where Coogan's body was?
A. Yes.
Q. Where was it?

Mr. Erdall: To interpose an objection, I will ask to examine him.
Mr. Sheehan: I will ask him another question.

Q. Did you and the other members of the crew go back there after Dubke discovered the body?

Mr. Erdall: That is objected to as leading.
The Court: Sustained.

Q. Where did you go after Coogan's body was discovered?
A. We all kind of walked back that way.

Mr. Erdall: We move that be stricken.
The Court: It may stand.
Mr. Erdall: Exception.

Q. Did you see where the body was?
A. Yes.
[fol. 64] Q. Were the other members of the crew back there?
A. They went back, yes.
Q. Did you go back the same time they did?
A. Yes.
Q. Where was his body laying?
A. Just outside of the south rail.
Q. Was it laying at right angles or parallel with the rail?
A. I should judge parallel with the rail.
Q. Which way from the caboose was it?
A. West of the caboose.
Q. Where was it in reference to the ties projecting beyond the south rail?
A. He was on the ties; on the edge of the ties.
Q. How far west of the caboose, of the west end of the caboose was the body?
A. In the neighborhood of a car and a half.
Q. Did you examine the cars there and the wheels to see if there was any blood?
A. I did not in particular myself, but I noticed the blood on the wheels.
Q. Where?
A. On the rear wheel of the rear car.
Q. Did you notice any of his clothing attached to any part of the wheels, or car or anything?
A. Pieces of his clothing resembling his shirt were caught on a bolt in the journal box.
Q. Now, the journal box was on what wheel?
A. It was on the rear wheel of the rear car on the south side.
[fol. 65] Q. That would be the car coupled to the caboose?
A. Yes.
Q. And the rear end of that car or the rear wheel of the car nearest to the caboose?
A. Yes.
Q. Describe what the journal box is, Mr. Odekirk.
A. I don't know, a box with a place for oil and lubricants for the journal.
Q. Running through the center of the wheel is what they call the journal, which projects out beyond the wheel?
A. Yes.
Q. And on that is a box, I think Conductor Jeffers described it; that journal, you say, is through the center of the wheel?
A. Yes.

Q. Does that project out beyond the wheel?
A. Yes, it does.
Q. Is there anything on the end of it; where is the journal box located in reference to that?
A. The journal box is at the end of the journal.
Q. What is that for?
A. For the purpose of lubricating the car, keeping it oiled.
Q. How large is that box?
A. There are different sizes.
Q. About how large are they?
A. I don't know. I should judge about eleven or twelve inches square.
Q. And do they have one on the end of the journal on each wheel?
[fol. 66] A. Yes.
Q. And on this car did they have what is known as an arch bar?
A. Yes.
Q. A bar running from one wheel to another?
A. Yes.
Q. Where is that placed in reference to the journal box?
A. That runs from one journal box to another under the frame of the trucks.
Q. On top or below?
A. I don't know what an arch bar is; there is a beam on both the top and bottom.
Q. On top and below?
A. Yes.
Q. How is that fastened?
A. By bolts.
Q. Where are the bolts?
A. They are through the corners of the wheel houses.
Q. Through the corners; the outside corners?
A. Yes.
Q. How are the bolts put on, from the bottom or the top?
A. From the top.
Q. Underneath, do they have anything on the bolt?
A. Yes, a burr.
Q. Did this that you saw the part of his shirt on have a bolt nut on?

Mr. Erdall: That is objected to on the ground that it is not what the witness testified to.
[fol. 67] The Court: The form of question is improper. Sustained.

Q. What part of the journal box was the shirt on?
A. On the end of this bolt.
Q. Did that bolt have a nut on?
A. Yes.
Q. Down underneath the journal box?
A. Yes.

Q. Was there anything else in that bolt?
A. I am quite sure there was a cotter key in there.
Q. What was the condition of the ground west of his body; was there anything to show, could you tell from the condition there whether his body had been moved along the ground or not?
A. There were indications that he had been dragged a distance.
Q. About how far?
A. Ten or twelve feet, I should judge. Maybe fifteen.
Q. By indications, what do you mean?
A. The ground was scuffed up a little.
Q. What kind of a ballast is there along that track between the ties?
A. Gravel.
Q. Now, Mr. Odekirk, there has something been said about the air pipe, about the air pipe used in the control of the brakes; did this train have air brakes on it?
A. Yes.
Q. What do they use for the air to pass through?
[fol. 68] A. I don't understand you.
Q. There is a train line pipe under each car?
A. Yes.
Q. And at the end of each car did they have anything attached to the pipe?
A. Yes, a air hose.
Q. How long is that air hose?
A. I don't remember what the size of it was, maybe a foot and three-quarters.
Q. The air hose?
A. Yes.
Q. And where does that pipe come out in reference to the draw bar?
A. It goes out along the side of the draw bar.
Q. And do you have that hose at both ends of each car?
A. Yes.
Q. And about how long is that hose from where it is fastened to the pipe?
A. I don't think it is quite three feet.
Q. Where is the draw bar, in reference to the end of the car, at the center or at the side?
A. The draw bar is right in the center.
Q. Assuming this table is the end of the car, would you say the bar, the draw bar is about here at the center?
A. Yes.
Q. That is a part of the automatic coupling?
A. Yes.
Q. And it is that way in every car with automatic couplings?
A. Yes.
[fol. 69] Q. About how wide is that automatic coupling?
A. The head of it I should judge, is nearly a foot.
Q. Now, in reference to the draw bar, where does the pipe line come out with the hose attached to it?

A. There is a pipe line comes out on each side of the draw bar.
Q. This is the end of one car, on which side would this pipe line come out?
A. If you take the end of the east car it would come out on the left-hand side.
Q. How would the pipe line come out on the car that this was coupled to?
A. On the other side of the draw bar.
Q. When those hose are attached,—I will withdraw that. When those hose attached to the end of this air pipe line are coupled, they couple them down underneath the draw bar, do they?
A. Yes.
Q. And they have to be coupled in order to pump up the air to make the connection between for the operation of the brakes through the train?
A. Yes.
Q. What is the standard gauge, what is the gauge of a standard railroad?
A. Four foot, eight inches, I think; four foot, eight and a half.
Q. The Milwaukee is the same as all the other railroads in this state?
A. Yes.
Q. And they all are what is know as standard gauge?
[fol. 70] A. Yes.
Q. And by standard gauge—you say it is four foot, eight and a half, what do you mean by that?
A. From rail to rail.
Q. What is the width of the average box car?

Mr. Erdall: That is objected to as immaterial, no foundation laid—incompetent, irrelevant and immaterial.
The Court: Overruled.

A. Nine foot, I believe it is.
Q. Were there all box cars in this train as you recall it?
A. I think they were.
Q. Mr. Odekidk, was there what is know as an air pipe line along track 1, at that time?
A. Yes.
Q. About how long was that air pipe line?
A. I have no idea.
Q. Can't you give a general estimate?
A. It was fifteen car lengths, as near as I can give.
Q. Where was that air pipe line in reference to track No. 1?
A. On the south side of the south rail.
Q. Where in reference to the ties?
A. It was on top of the ties, about a foot from the rail, I should judge.
Q. On top of the ties, about a foot from the rail?
A. Yes.
Q. In its normal condition was it fastened to anything?

[fol. 71] Mr. Erdall: We object to the form of the question. There is no foundation laid and it calls for a conclusion of the witness. It is incompetent, irrelevant and immaterial, too.

The Court: Overruled.

Mr. Erdall: Exception.

A. In its normal condition it is fastened to the ties.

Mr. Erdall: We move to strike the answer as not responsive.

The Court: Motion denied.

Q. By what means was it fastened to the ties?

A. By spikes or clamps.

Q. By clamps, what do you mean by that?

A. Anything that would hold it to the ties.

Q. What do you mean by a clamp?

A. Anything that would go over the pipe and fasten it.

Q. Something that went over the pipe to fasten to what?

A. To the ties.

Q. In that position would it be down snug to the tie?

A. Yes.

Q. Did you notice the condition of this air pipe line on the day of this accident?

A. Yes.

Q. Right immediately west of where the plaintiff's body was found?

A. Yes.

Q. Where Mr. Coogan's body was found?

A. Yes.

[fol. 72] Q. What was the condition of that air pipe line that day immediately west of where his body was found?

Mr. Erdall: That is objected to on the ground that the question does not show just what is meant by immediately west. We object to the form of the question.

The Court: Perhaps you better fix that more definitely, Mr. Sheehan.

Q. How far from the body was it that, or how far from the body was it to where you noticed the condition of the pipe that I have called your attention to?

A. About a car length and a half. Perhaps I don't understand your question.

Q. How far from the body was it to the particular place where you noticed the condition of this air pipe?

A. It was a half a car length, I should judge.

Q. And what was the condition of the air pipe line at that point, a half a car length? What was the condition of the pipe line at that point a half a car length from where his body was found?

A. It had a bend in it and it was also loose from the ties.

Q. What do you mean by loose from the ties?

A. It was not fastened to the ties.

Q. And what do you mean by saying that it had a bend in it?

A. Bent, that is all I know.
Q. In what way was it bent?
[fol. 73] A. It was bent in toward the rail and up off the ties.
Q. How far up off the ties was it?
A. Three and a half or four inches.
Q. And where it was bent in toward the rail, how far was it from the rail?
A. Well, about, I should judge six inches from the rail.
Q. Now, for how long a space did that condition in the ties where it was unfastened from the rail, or unfastened from the ties and bent up from the ties, extend; how far?
A. The entire bend of the pipe was fifteen foot long.
Q. And when a man attempting to couple the air, steps in from the south side, what would be the natural position for him to take to make that coupling?

Mr. Erdall: That is objected to as calling for a conclusion; no foundation laid.
The Court: Overruled.

A. He would be headed toward the head end of the train, going with the train.
Q. What I want to get at is the natural position for him to place himself in, his feet and everything.
A. It would be natural for him to be headed toward the engine with one foot inside of the rail and the other out.
Q. And if he is headed that way, which would be the natural foot to have inside of the rail?

Mr. Erdall: That is objected to as calling for a conclusion.
[fol. 74] The Court: He may answer.

A. He would have his right foot.
Q. In your investigation there that day in looking over the ground, did you observe anything, any marks or anything, to indicate whether Mr. Coogan had stepped in there between those cars?

Mr. Erdall: That is objected to as calling for a conclusion.
The Court: Sustained.

Q. Was it any part of the duties of your crew, yourself and Dubke or any of your crew, to couple that air?
A. No.
Q. Whose duty was it?
A. The duty of that crew of 92.
Q. Who, of the crew of 92?
A. Mr. Coogan and Delhanty and Jeffers.

Cross-examination.

By Mr. Erdall:

Q. You say your name is Robert Odekirk?
A. Yes.

Q. And you were the head brakeman or rear brakeman on this run from Minneapolis?
A. Yes, head brakeman.
Q. And as I understand you, you worked up with the engine, did you?
A. I was following the engine.
Q. Did they have a man on that crew by the name of Murphy?
A. I was working by the name of Murphy.
Q. What is your real name?
A. Odekirk.
[fol. 75] Q. But you were known as Murphy by the Milwaukee?
A. Yes.
Q. That is correct?
A. Yes.
Q. Did you hire out under the name of Murphy?
A. Yes.
Q. And when you hired out for the Milwaukee it was necessary for you to fill out an application blank, was it not?
A. Yes.
Q. It was necessary for you to give certain information in that blank with reference to your own name and the names of your family?
A. Yes.
Q. Now, then, have you any children?
A. I have.
Q. How many?
A. One boy.
Q. What is his name?
A. Gerald.
Q. What is his last name?
A. Odekirk.
Q. Now, then, when you filled out the application blank for the Milwaukee road, what did you put his name down as?
A. I don't remember whether I put it down or not.
Q. What was the first name you went under when you worked for the Milwaukee?
A. J. E.
Q. What did the J stand for?
[fol. 76] A. John.

Defendant's Exhibit "A" marked by the reporter.

Q. I show you Defendant's Exhibit "A," and call your attention to a signature which appears on the reverse side of the first page; I will ask you if that is your signature?
A. Yes.
Q. You wrote that in yourself, did you?
A. Yes.
Q. What is your wife's first name?
A. Florence.
Q. And you made out that application blank yourself?
A. I did.

Q. And the Florence Murphy and Gerald mentioned in that application blank are your wife and child?
A. Yes.
Q. Did you ever work for the Milwaukee under the name of Odekirk?
A. Yes.
Q. Did you make out an application blank for that?
A. Yes.
Q. When you worked the second time, that is, this time when you were working in July, the application you made out at that time for that, you did not say anything about working for them under the name of Odekirk?
A. No.
Q. What is your second name?
[fol. 77] A. Isaac.

Defendant's Exhibit "B" marked by the reporter.

Q. I show you Defendant's Exhibit "B," and call your attention to a signature which appears on the reverse side of the first page of that, Robert Isaac Odekirk, is that your signature?
A. Yes.
Q. You put that in yourself?
A. Yes.
Q. And this whole application was made out by you?
A. Yes.
Q. And in your handwriting?
A. Yes.
Q. All the references and everything of that kind, including the members of your family?
A. Yes.
Q. Now, Mr. Odekirk, or Murphy, which do you prefer to have us call you?
A. Odekirk.
Q. Mr. Odekirk, you have worked for a good many railroads?
A. Yes.
Q. Quite a number?
A. Yes.
Q. You worked for the Minneapolis and St. Louis and you worked for the N. P., is that right?
A. Yes.
Q. I will ask you whether you worked for the Northwestern from 1905 to 1910, at Winona, Minnesota?
A. I worked on the Minnesota division.
[fol. 78] Q. And you worked during those five years from 1905 to 1910, for the Northwestern?
A. Yes.
Q. I will ask you if you worked from July, 1910, to August, 1910, as a brakeman for the N. P. at Livingstone, Montana?
A. I worked there some, I don't remember the dates I was there, though.

Q. You did work for the N. P. at Livingstone, Montana?
A. Yes.
Q. What name did you work under when you worked for the Northwestern?
A. My own name.
Q. Odekirk?
A. Yes.
Q. And for the N. P. as Odekirk?
A. Yes.
Q. Whether you worked from September, 1920, to December, 1910, as a switchman for the Northwestern at Mason City?
A. Yes.
Q. Under what name?
A. Odekirk.
Q. If you worked from June, 1912 to 1917, as a brakeman on the C. and N. W. at Winona?
A. Yes.
Q. Under what name?
A. Odekirk.
Q. Ask you if you worked for the Libby Cement Company at Winona from 1917 to 1920?
A. There is no such outfit there that I know of.
[fol. 79] Q. You did not work for them?
A. No.
Q. Did you ever work for the Minnesota Transfer Company?
A. Yes.
Q. Under what name?
A. Odekirk.
Q. During what period?
A. 1910 and 1923.
Q. Continuously?
A. No, in 1910 and also in 1923.
Q. During what months in 1923?
A. The month of August.
Q. August, 1923?
A. I was only there a few days waiting for a job on the M. and St. L.
Q. Now, then, when you worked at Marshaltown, Iowa, for the Minneapolis and St. Louis, who was your superintendent?
A. I never worked there.
Q. You never worked at Marshaltown, Iowa?
A. No.
Q. And who was your superintendent when you worked for the Minnesota Transfer?
A. Dooley, the first time, and I think McCarthy.
Q. Did you work for the Minnesota Transfer Railway in 1916?
A. No.
Q. Did you work for them in the year 1917?
A. No.
Q. 1917?
A. No.

[fol. 80] Q. 1918?
A. No.
Q. Or in 1920?
A. No.
Q. And as I understand you, you did not work for the M. and St. L. at Marshaltown, Iowa?
A. No.
Q. Did you work for the Minneapolis and St. Louis from September 4, 1912, to April 5, 1916?
A. No.
Q. You did not?
A. No.

Mr. Erdall: We offer Defendant's Exhibit "A" in evidence.
Mr. Sheehan: No objection.
The Court: Received.

Defendant's "A" is read to the jury by Mr. Erdall.

Q. Now, then, Mr. Murphy, when you made application to the Milwaukee road, this application, you knew that the information that you put in that application was not true, didn't you?
A. Yes.
Q. Now, then, Mr. Odekirk, you, of course, did not see this accident?
A. No, I did not.
Q. As I understand you, Mr. Odekirk, you said that after they had put in all of those cars on this train and had coupled up the road engine on to the train, you looked back along the cars and saw air escaping from the air hose about four cars back, you so testified to that?
[fol. 81] A. I think it was about that.
Q. Where were you standing at that time?
A. If I am not mistaken, I left the road engine——
Q. When you saw this air escaping?
A. What is that?
Q. When you saw the air escaping four cars back, where were you standing?
A. Aside of the engine.
Q. South or north?
A. South.
Q. On the south side of track one?
A. Yes.
Q. And you also said you saw the air escaping from the rear car?
A. Yes.
Q. Were you standing at the same place then?
A. Yes, just about.
Q. That was about seventeen cars back?
A. I don't know just how many cars were on that train.
Q. And those cars are how long, on an average?
A. On an average of forty feet.

Q. And you saw the air escaping from two cars, one, the fourth car, and the other at the rear of the train?

A. Yes.

Q. And you could see—that was seventeen cars at forty feet for each one?

A. Yes.

Q. Now, then, you were looking back toward the end of the train?

[fol. 82] A. Yes.

Q. The yard is a flat yard?

A. Yes.

Q. There is no obstruction or anything between track one and two, was there?

A. No.

Q. Track two is one track south of one?

A. Yes.

Q. And you could see so that you could see the air coming out?

A. The dust blowing from the air.

Q. When you were looking back that way did you see Coogan's body lying there?

A. No.

Q. You could see the air escaping back of him but you could not see him?

A. No.

Q. And he was between you and that car?

A. Yes.

Q. Now, then, you say after Dubke discovered the body you all started back, you started back with Delhanty, did you, or at least while you were walking back you met Delhanty?

A. I cannot swear to that. I know that as soon as we realized that something had happened we all started back.

Q. And you did not go way back to the body?

A. Not quite.

Q. It was quite a few cars?

A. It was close enough to see Coogan.

Q. Close enough to see that it was a body?

[fol. 83] A. Yes.

Q. And you turned around and went the other way with Delhanty, is that correct?

A. I stayed around a few minutes; I don't remember who I walked away with.

Q. And did you go and make an examination there, or not?

A. I saw the condition he was in and I could not stand to look at him.

Q. How far were you, four or five car lengths, when you and Delhanty stopped?

A. I don't just remember that.

Q. And you went up to the body after they put the cover on it?

A. No, before.

Q. You remember that cover, do you?

A. Yes.

Q. And you did not go down before that cover was put on?

A. Yes.

Q. Where were you when the cover was put on over the body?

A. I was right around it. If I am not mistaken, Marshall got out a coat and put it over the body.

Q. Did you make an inspection of the train?

A. Not until after. There were some parties came there. One was a car inspector from Minneapolis or a safety appliance man or something.

Q. And did you look at this wheel on the first car ahead of the caboose and the rear wheel on the south side immediately after you went down?

A. At the time we were all there.

[fol. 84] Q. Was the body still there?

A. Yes.

Q. When did you make an inspection of this air pipe line?

A. Immediately after we let the engine of the train go.

Q. When was it that you say that you made an inspection of the air pipe line that runs along the track?

A. That morning.

Q. When?

A. Right immediately after that or right at that time.

Q. Did you go along the pipe to see if it was in good condition?

A. I noticed the place on probably twenty ties.

Q. That was some little distance west of where Coogan's body was?

A. Yes.

Q. I believe you said about half a car length?

A. I could not swear to that; ten or twelve feet perhaps.

Q. You say ten or twelve feet now instead of half a car length?

A. I could not say exactly.

Q. Didn't you testify before that it was half a car length?

A. Probably I did.

Q. I understand you to say, Mr. Odekirk, that the natural position for a man coupling up the air between the caboose and the first car ahead of the caboose would be for him to stand inside with the [fol. 85] right foot inside of the rail and the left foot outside of the rail and facing the head of the train, or, in other words, facing the west, is that correct?

A. Yes.

Q. Then, Mr. Odekirk, I understood you to say on direct examination that the air pipe line extends under the cars and at the end of the cars it was attached to a hose, or air hose, and you said the air hose was about three feet long, that is correct, is it?

A. Yes.

Q. And the air hose on one car extends from one side of the draw bar and the air hose of the car that is coupled on to it extends from the other side of the bar?

A. Yes.

Q. In other words, one air hose would start at the south side of the draw bar and one from the north side?

A. Yes.

Q. And they are coupled up underneath the draw bar?
A. Yes.
Q. Now, then, how much space, Mr. Odekirk, if any, is there between the train line air pipe and the draw bar; is the line next to the draw bar?
A. No, it is not. It is away from the draw bar, about six inches.
Q. About six inches away from the draw bar?
A. Yes.
Q. Does it extend as far as the draw bar—I am talking about the [fol. 86] train pipe—or does it extend only to the end of the car?
A. It projects from the end of the car a little.
Q. How far?
A. Four or five inches.
Q. Outside of the end of the car?
A. Yes.
Q. And about how much space is there between two cars when they are coupled together?
A. It is anyway three feet. It depends on which way your slack is, I suppose.
Q. You did not make any inspection of this air hose at that time, did you?
A. What?
Q. You did not make any inspection of those air hoses at that time?
A. No, I did not.
Q. You have no recollection about them at all, except that there were air hoses there?
A. Dubke made the two air couplings. The coupling on the caboose was not made.
Q. The coupling between the caboose and the car ahead of it was not?
A. No.
Q. But you did not pay any particular attention to looking at the air hose at all, did you?
A. No, I didn't.
Q. Then you mentioned a cotter pin on the underneath side of the arch bar bolt, you said your recollection was that there was a cotter pin there at that point?
A. Yes.
Q. Do you see cotter pins on bolts of that kind quite frequently? [fol. 87] A. Yes.
Q. A very common thing, isn't it?
A. It is on those bolts, I believe.
Q. There was nothing unusual tabout these cotter pins on this arch bar bolt, was there?
A. No.
Q. And I presume the purpose of such cotter pin is to keep the bolt from running off the burr or not on the bolt?
A. That is the purpose of it.
Q. Now, then, Mr. Odekirk, I will ask you if you remember seeing some pictures taken of this train before it was moved?

A. I do.
Q. I show you Defendant's Exhibit "D," and ask you if you recall the cars shown in that picture?
A. I do.
Q. And was that the caboose and the first car ahead of the caboose shortly after the accident?
A. Yes.
Q. It was the location of the car?
A. Yes.
Q. You were present when that was taken by Mr. Lee?
A. Yes.
Q. That correctly shows that situation?
A. Yes.
Q. And as I understand it, the air hoses were uncoupled between the caboose and the car ahead of the caboose?
[fol. 88] A. Yes.
Q. I show you Defendant's Exhibit "C," and ask you if that correctly shows the situation between the caboose and the first car ahead of the caboose, at that time?
A. Yes.
We offer in evidence Defendant's Exhibits C and D.
Mr. Sheehan: No objection.
The Court: They may be received.

Redirect examination.

By Mr. Sheehan:

Q. Mr. Odekirk, what are the various lengths of box cars?
A. In the neighborhood of forty feet.
Q. They are various lengths?
A. They are thirty-six foot cars, and I believe thirty-four foot, and forty foot cars.
Q. Sme thirty-three, and some forty-two; they run from thirty three up to forty at least, do they not?
A. Yes.
Q. Now, in reference to another matter. You told counsel you had worked for the Northwestern road?
A. Yes.
Q. Where were you born?
A. Gary, North Dakota.
Q. How long have you lived in Minnesota?
A. About forty years.
Q. Where did you live in Minnesota when you came from North Dakota?
[fol. 89] A. We moved to Rochester, Minnesota.
Q. When did you first start railroading for the Northwestern?
A. In 1904.
Q. And you worked for them how long at that time?
A. I worked for them until 1910, I believe.

Q. From 1904 to 1910?
A. Yes.
Q. As a brakeman?
A. Yes.
Q. And where did you go to work from there?
A. I worked for the N. P. and the Oregon Short line for four or five years.
Q. Was that the time you were in Montana working for the N. P.?
A. Yes.
Q. Did you work under the name of Odekirk when you worked for the N. P.?
A. Yes.
Q. Did you work under that name from 1904 to 1910, for the N. P.?
A. Yes.
Q. Wen did you work for the Northwestern the second time?
A. I worked for them in Mason City in 1911, and Baraboo, Wisconsin in 1911.
Q. How long did you work for them the second time?
A. I worked for them at Mason City about three and a half months, and was then sent back to the Minnesota division.
[fol. 90] Q. How long were you on the Minnesota division
A. From June, 1912, until the 6th of December, 1917.
Q. Did you work under your own name, Odekirk?
A. Yes.
Q. What road did you go to work for then in 1912, after you left them?
A. The Omaha, in Minneapolis.
Q. How long were you with them?
A. All winter.
Q. Under your own name?
A. Yes.
Q. Where did you go from there?
A. To Livingstone, Montana, again.
Q. For the N. P.?
A. Yes.
Q. What road did you work for before you went to work for the Milwaukee the last time?
A. The Great Northern.
Q. How long were you with the Great Northern?
A. Nearly three years.
Q. Under the name of Odekirk?
A. Yes.
Q. Had you worked under your own name up to the time you went to work for the Milwaukee the last time?
A. Yes, all the time.
Q. How did you happen to give your name as Murphy on that occasion?

[fol 91] Mr. Erdall: That is objected to as immaterial.
The Court: Overruled.

A. This job that I went to work on was a road job, and I did not prefer road work and did not intend to stay there. I had a family in Minneapolis and I wanted to get yard work and was waiting for it.

Mr. Erdall: Defendant moves that answer be stricken as not responsive.

The Court: Motion denied.

Q. What had that to do with it, explain why you did that and why you gave that record?

A. My reason for doing that was because I did not expect to be there very long, and would rather not mix my own record up.

Q. And that was your only reason?

A. Yes.

Recross-examination.

By Mr. Erdall:

Q. Now, then, Mr. Odekirk, you say the reason you went under the name of Murphy, was because you did not expect to say there very long?

A. Yes.

Q. Now, then, I will ask you if you did not go through bankruptcy twice in Minneapolis in 1921 and 1923?

A. Yes.

Mr. Sheehan: That is immaterial.

Q. You did go through bankruptcy in 1921 and 1923?

A. Yes.

[fol. 92] Q. Those were two separate proceedings, were they?

A. Yes.

Q. Now, then, I understand you to say you worked for the N. P. and the Oregon Short Line from 1904 to 1910?

A. No.

Q. Isn't that what you just stated?

A. No.

Q. Didn't you just state you worked in 1904 or 1910?

A. I worked on the North Western.

Q. And what road did you work on in 1912?

A. For the North Western in 1912, in June the second time.

Q. And how long did you work for the North Western?

A. Until 1917.

Q. What period did you work for the N. P. and the Oregon Short Line?

A. In 1918.

Q. 1918?

A. Yes.

Q. Did you ever work for them at any other time?

A. I worked for the N. P. in 1910, also.

Q. And you worked for the Oregon Short Line, too?

A. Yes.

Q. Had you worked back and forth for one railroad, and then you would quit and go to work for another road?
[fol. 93] A. Yes.
Q. And that was during your entire railroad service?
A. Yes.
Q. That is all.

H. J. Goodwin, being called, was duly sworn and testified as follows on direct examination.

By Mr. Sheehan:

Q. Your name is H. J. Goodwin?
A. Yes.
Q. You are an attorney at law?
A. Yes.
Q. Practicing in this state?
A. Yes.
Q. Do you remember the occasion in July, of going to Lakeville?
A. I do.
Q. Do you remember the occasion when you were there with me and I had a pair of shoes given to me by Mr. Gephart?
A. I do.
Q. What did I do with those shoes?
A. Why, you handed them to me.
Q. Where have they been ever since?
A. I took them to St. Paul and put them in our safe.
Q. In whose possession have they been?
A. In my possession.
Q. Are they in the same condition now as they were when they were turned over to you, at that time?
[fol. 94] A. They are, except that I think that mark on the counter, the outside counter is not just in the same condition as it was when I got it. It seems to have ironed itself out. Otherwise, they are in exactly the same condition.
Q. This is the pair of shoes that I showed you?
A. That is the same, yes.
Q. That depression is in what shoe?
A. The left shoe, and it is on the outside, the left side of the left shoe on the counter at the heel.

Mr. Sheehan: We offer these shoes in evidence.
Mr. Erdall: We object to it on the ground that there is no- sufficient foundation laid; immaterial.
The Court: Overruled.
Mr. Erdall: Exception.

Cross-examination.

By Mr. Erdall:

Q. Do you know the date you were there?
A. I dont know exactly, but I can refresh my mind when I get

to the office, but my best recollection is that it was a week to ten days thereafter. I don't think it was over then days after the time of the accident.

Q. A week to ten days after the accident?

A. Yes.

Q. You are one of the attorneys of record in this case?

A. Yes.

Q. Sheehan and Goodwin are the attorneys of record in this case?

A. Yes.

[fol. 95] Q. Now, then, what interest have you in this case?

A. An attorney's interest.

Q. What is that interest?

Mr. Sheehan: That is objected to on the ground that it is immaterial.

Overruled.

A. You want to know the arrangements the case was taken on?

Q. What basis is the case handled on?

A. On a basis of one-third to us and two-thirds to the widow.

Q. Who pays the costs?

A. The costs come out of the judgment.

Q. And you would divide it into one-third and two-thirds?

A. I think that is done on cases of that kind.

Q. I want to know what is done in this case?

A. I cannot tell you definitely. Mr. Sheehan has made the final arrangements so that I cannot tell it to you, for the reason that I do not know.

Q. Is anybody beside yourself and Sheehan interested in that amount, which you recover for services?

A. No.

Q. Do you know a man by the name of Murphy, a brother-in-law of Odekirk's?

A. No.

Q. You don't know of any such man?

A. No.

Q. Do you know the brother-in-law of Odekirk?

[fol. 96] A. I think I met a brother-in-law of his, but I don't remember his name. However, it had nothing to do with this case.

Q. He was the man who brought this case to your office?

A. I don't know who brought the case to the office.

Q. And you say you went down and saw those shoes about ten days after the accident?

A. I can tell you exactly by refreshing my mind when I get to the office, but it was somewhere in the neighborhood of ten days.

Q. How long before you brought the action was it?

A. Of course, the files would tell that. I dont remember this matter.

Q. The action was brought in the fall sometime, was it September or October?

A. Yes.

Q. And you say that you went down to get the shoes about ten days after the accident?

A. Something like that, yes.
Q. How did this case happen to come into your office?
A. I told you I could not tell you. I understand that somebody told Mr. Sheehan, some friend of Mr. Sheehan's, who knew the people or something.
Q. And he went to them and asked them for the case?
A. I don't know.

By Mr. Sheehan: The return of the sheriff shows that the sum-
[fol. 97] mons and complaint was served on the 12th of October, 1923.

Mrs. EDITH F. COOGAN, being called, was duly sworn and testified as follows on direct examination.

By Mr. Sheehan:

Q. Mrs. Coogan, you are the plaintiff in this action; you brought this suit?
A. I am.
Q. You brought this suit as administratrix of the estate of William Coogan, deceased?
A. I did.
Q. This action was brought by you on behalf of yourself and the children?
A. Yes.
Q. How old are you?
A. I am thirty-three years old.
Q. How many children have you?
A. Six.
Q. William Coogan was your husband?
A. Yes, he was.
Q. And you had been living together ever since your marriage and up to the time of his death?
A. We had.
Q. What are the names of your children, and their ages?
A. Floretta, a girl, thirteen.
Q. And next?
A. Edgar, twelve.
Q. He is a boy?
A. Yes.
[fol. 98] Q. And next?
A. Kenneth, ten.
Q. And next?
A. Doris, eight.
Q. Next?
A. Carlton, five.
Q. And next?
A. Lucy, two.
Q. Those are your children that you have named that you have here in court?
A. Yes.

Q. And how old was your husband at the time of his death?
A. Thirty-nine years.
Q. How long had he been working for the Milwaukee road?
A. All together, off and on, about twenty years; the last time. It was nearly fourteen years.
Q. The last time he worked about fourteen years?
A. Yes.
Q. In what capacity did he work?
A. Brakeman.
Q. Had he been examined for conductor?
A. He had.
Q. And passed?
A. Yes.
Q. Had he operated trains as a conductor, before his death?
A. Yes.
Q. About what was his earning capacity and about what did he earn, taking it the last year?
[fol. 99] A. The last year he earned somewhere around $2,500.00.

Plaintiff's Exhibit "B" marked by the reporter.

Q. I show you this book, marked Plaintiff's Exhibit "B" and will ask you what that is.
A. You ask me what it is?
Q. Yes.
A. It is our deposit book at the bank.
Q. In what bank?
A. The First National Bank of Austin.
Q. And that is from January, 1922, to August 2, 1923, is it?
A. It is.
Q. Was there any money deposited in this bank?
A. The checks.
Q. That he had received from the Milwaukee road in payment, from July 1, 1922, to July 1, 1923?
(No answer.)
Q. What do the entries in this book from July, 1922, to July 19, 1923, represent?
A. They represent the checks that Mr. Coogan drew from the railroad company.
Q. And there was no other money in this deposit except those checks?
A. No.
Q. How often did he draw the checks?
A. Every two weeks.

We offer in evidence Plaintiff's Exhibit "B," the entries between those dates especially.

Mr. Erdall: No objection.
The Court: It may be received.

[fol. 100] Q. Mrs. Coogan was that deposit subject to your checks?
A. It was.
Q. Who deposited those checks?

A. I did.

Q. How much of that money, as near as you could estimate, this $2,500.00 you say he earned the year before his death, how much of that did he use for himself, in your best judgment?

A. I should think it would be less than $500.00.

Q. Was Mr. Coogan interested in his family and his children?

A. He was.

Q. Did he appear to take an interest in their education and training?

A. He did.

Q. Your children are attending school?

A. Four are attending school.

Q. The balance of that money, outside of what he used, was used for yourself and the children?

A. It was.

Q. Was he a steady worker?

A. He was.

Q. What was the condition of his health?

A. His health was good.

Q. During May, one pay day in May, 1923, May 4, 1923, his check was $45.00, do you know the reason for that?

A. Yes, he took a vacation and went to Iowa to visit his relatives.

Cross-examination.

By Mr. Erdall:

[fol. 101] Q. I understand Mr. Coogan worked on this same run some time before the accident; he worked on trains 91 and 92?

A. Yes.

Q. And when he was to take a run from Austin, about what time would he leave, going from Austin to Farmington?

A. If I remember right, he was called to go to work about seven-fifteen.

Q. And do you know the approximate time he would arrive at Farmington?

A. No, I do not.

Q. Then he would take train 92 coming from Farmington going back to Austin?

A. Yes.

Q. You heard the testimony that he left about seven A. M.?

A. Yes.

Q. What time would he return to Austin?

A. Not always the same time, but usually from three o'clock on, toward evening.

Q. From three in the afternoon?

A. Yes, toward evening.

Q. And he would get there during the afternoon usually?

A. Yes.

Q. Had he been working on that particular run for three or four months practically all the time?

A. He had.

That is all, Mrs. Coogan.

[fol. 102] THOS. P. MORAN, being called, was duly sworn and testified as follows on direct examination.

By Mr. Sheehan:

Q. Judge, you are the probate judge of Dakota county?
A. I am.
Q. And have been for some years?
A. Yes.
Q. About how many years?
A. More than thirty-three.
Q. You are familiar with the American Experience Tables of mortality furnished by the attorney general's office?
A. I am.

(Plaintiff's Exhibit "C" marked by the reporter.)

Q. I show you Plaintiff's Exhibit "C." Does that show the expectancy of a man thirty-nine years of age, according to the American Mortality Tables?
A. It does.
Q. What is his expectancy?
A. Twenty-eight and ninety one-hundredths years.
Q. Does that table also show the present value of one dollar payable at the end of each year for a man of various ages from one year up for the expectancy of that man's life?
A. It does.
Q. Does that table show the amount it would take at the present time to pay one dollar a year for a man thirty-nine years of age, for his expectancy of life, twenty-eight and ninety one hundredths [fol. 103] years?
A. It does.
Q. And what is that amount?
A. $13.88 in round numbers.
Q. The first figures given in round numbers, that is the dollars, but they carry it out to several figures, following the eighty-eight?
A. Yes, 1092.
Q. But the $13.88, by that I understand you, $13.88 put out at interest, that would pay a dollar a year for twenty-eight and ninety hundredths years?
A. That is my understanding of the table.
Q. And those are taken from the American Experience Tables?
A. The same as furnished us by the attorney general.
Q. And under the inheritance tax law, for the purpose of figuring the present value of life estates, the legislature of this state passed a law to use that table?

Mr. Erdall: That is objected to as immaterial.
The Court: Sustained.

Q. So, if a man's income or contribution to his estate was $200.00 a year instead of $1.00 a year, payable at the end of his expectancy

of life, to ascertain that from the tables, you would multiply the two hundreds by 13.88?

A. Yes.

Mr. Erdall: That is objected to as calling for a conclusion of the witness.

[fol. 104] The Court: It is a matter of computation, I think.

Mr. Sheehan: We offer Plaintiff's Exhibit "C" in evidence.

Mr. Erdall: We object to the introduction of the exhibit on the ground that the law speaks for itself. It is incompetent, irrelevant and immaterial.

The Court: I think it is a matter that the court must take judicial notice of. I won't rule on it at the present time.

Plaintiff rests.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Erdall: At this time the defendant would like to make a motion.

The Court: The jury is excused at this time until nine o'clock tomorrow morning.

By Mr. Erdall: At this time the defendant makes a motion for dismissal on the merits, on the ground that the plaintiff has failed to show that Mr. Coogan's death was caused by any actionable negligence on the part of the defendant.

After argument on this motion, the motion was withdrawn by Mr. Erdall.

Court convened at nine o'clock, December 12, 1923.

By Mr. Sheehan: It is stipulated that the six children mentioned by Mrs. Coogan are the children of herself and William Coogan, deceased.

W. J. LEIB, being called, was duly sworn and testified as follows [fol. 105] on direct examination.

By Mr. Erdall:

Q. Your name is W. J. Leib?
A. Yes.
Q. And where is your home?
A. Minneapolis.
Q. Are you employed by the Milwaukee?
A. Yes.
Q. How long?
A. Almost continuously for thirty years.
Q. What is your present position with that company?
A. Trainmaster.
Q. What was your position with the company in July, 1923?
A. Trainmaster.

Q. I will ask you whether or not you were at Farmington on July 14, 1923?

A. I was.

Q. Did you arrive there while Mr. Coogan's body was alongside of the train?

A. Yes.

Q. Mr. Leib, I will show you Defendant's Exhibit "D" and will ask you if you know what that is?

A. Yes.

Q. What is it?

A. The caboose and rear car of train 92, on the morning of July 14th.

Q. Do you know what time that picture was taken?

A. Approximately ten-thirty A. M.

[fol. 106] Q. Who took it?

A. Either myself or Mr. Gerster of Farmington. I think I took it. If I did not take it I was with Mr. Gerster when he took it.

Q. That picture was taken either by you or in your presence?

A. Yes.

Q. Does that correctly represent the situation with reference to the caboose and the first car ahead of the caboose on train 92 at the time you arrived at the train?

A. It does.

Q. I show you Defendant's Exhibit "C" and ask you what that is?

A. This picture was taken by myself to show the safety appliances between the rear car of train 92, and the caboose on the morning of July 14th.

Q. What I had in mind is this, does it correctly show the situation with reference to the caboose and the first car ahead of it so far as it took in those cars at that time?

A. Yes.

Q. That was either taken by you or by Mr. Gerster?

A. It was taken by me.

Q. You have heard the testimony of other witnesses that the caboose was on the east end of the train?

A. Yes.

Q. Those pictures were taken from the south looking north?

A. Yes.

[fol. 107] Q. I show you Defendant's Exhibit "E" and ask you what that represents: when was the picture taken?

A. At the same time, by either Mr. Gerster or me, and represents the caboose and the rear two cars of the train in question.

Q. And were those cars in the same position and condition at the time the picture was taken as they were when you first arrived at Farmington?

A. Yes.

Q. Now, then, I notice on the picture there are two white marks, which appear to be south of the track on which the train is standing, and I will ask you what those represent?

A. The one near the rail represents the position of the feet of Mr. Coogan, and the one further away from rail represents the position of the head.

Q. And did you put those marks there or did somebody put them there in your presence?

A. Those marks, I did not put them there nor did I see them put there, but the position is approximately correct as to the location of the body when I arrived at the point.

Q. Do you know who put them there, or don't you?

A. I will say I don't know.

Q. I understand this picture is also taken from the south and looking in a general direction toward the north?

A. Yes.

[fol. 108] Q. And the first track which appears here, the one which is south of the train, what track is that?

A. Track two.

Q. And the train is on what track?

A. Track one.

We offer in evidence Defendant's Exhibit "E."

Mr Sheehan: No objection.

Q. I show you Defendant's Exhibit "F," and will ask you when that photograph was taken and by whom, if you know?

A. This was taken at the same time and by myself or Mr. Gerster.

Q. Was it taken in your presence?

A. Yes.

Q. And does that correctly represent the situation of the cars shown in that picture at the time the photograph was taken, and correctly show the situation with reference to those cars at the time you first arrived at the body?

A. It does.

Q. I note, of course, that the body is not there; had it been removed before you took the picture?

A. Yes.

Q. What cars are shown in this picture with reference to their location?

A. That shows the opening between the second and third cars ahead of the caboose.

Q. I will ask you whether or not the air is coupled between those cars?

A. The air is coupled.

Q. And I note there are two white marks on this picture between the first and second track, and are those the same white marks [fol. 109] shown on Exhibit "E"?

A. They were.

Q. And at the same location?

A. Same location.

Defendant's Exhibit "F" is offered in evidence.

Mr. Sheehan: No objection.

Q. Now, then, you will notice that just south of the south rail of track one, there appears to be some object which lays along the track and from one end of the picture to the other. I will ask you what that is?

A. That is the air pipe line.

Q. How long has that air pipe line been in the yards at Farmington, if you know?

A. To the best of my knowledge, it was put in in 1919.

Q. And approximately how far is that air pipe line from the south rail of track one?

A. About twelve or fourteen inches.

Q. I show you Defendant's Exhibit "C" again, and Defendant's Exhibit "D", and will ask you to examine those pictures and tell us on which side of the draw bar the air hose is on the caboose, whether it is on the south or north side?

A. The south side of the draw bar.

Q. And on which side is the air line which comes out of the first car ahead of the caboose, on which side of the draw bar?

A. On the north side of the draw bar.

Q. Now, then Mr. Leib, have you had any experience in coupling and uncoupling cars?

[fol. 110] A. More or less.

Q. And for what length of time?

A. My first experience was about 1908.

Q. And have you done considerable of it since that time, or have you not?

A. I have not done considerable of it, but part of my duty is to supervise this work.

Q. Have you seen a great many cars coupled or only a few coupled by trainmen during that period?

A. A great many of them.

Q. Have you observed the manner in which they couple cars?

A. I have.

Q. Now, then, I will ask you to look at Defendant's Exhibits "C" and "D," and I will ask you to tell us the natural way for a man to stand in coupling those cars, that is in reference to the direction in which he would face; also assuming that the man has one foot inside of the rail and one foot outside of the rail, I will ask you which foot would be the natural foot for a man to have inside of the rail, with the air hose in the condition that is shown on these two last exhibits?

A. Ordinarily the man faces the angle cock while making the coupling. In that position if one foot was inside of the rail it would be his left foot.

Q. And would he face toward the front or rear of the train?

A. Faces the rear of the train.

Q. Do men always stand with one foot inside of the rail and one foot outside?

A. No

[fol. 111] Q. How else?

A. Some men get both feet inside of the rail.

Q. If a man should stand with both feet inside of the rail I will ask you whether the natural position would be for him to face front or toward the rear end of the train, with the air hose in the condition shown in those two Exhibits "C" and "D"?

A. With both feet inside of the rail he could not make the coupling unless facing toward the rear of the train.

Q. Then, I take it, that would be the natural position, toward the rear end of the train?

A. Yes, it would.

Q. Now, then, Mr. Leib, when you arrived at the scene of the accident, or the place where you saw the body, I will ask you if you noticed any of the effects that Mr. Coogan had on, or anything of that character, and if so, where you observed it?

A. I noticed the hat between the rails and under the opening between the second and third cars from the caboose. My recollection is that the hat was closer to the second car than to the third car.

Q. Did you observe anything else under there at that time?

A. Not at that time, no.

Q. Now, then I will ask you to take your pencil and mark a cross at the proximate point where you observed the hat.

Witness marks exhibits.

Q. Now then, does this picture, Exhibit "F" correctly show the condition of the air pipe line within the scope of the picture, at that time, or not?

[fol. 112] A. It does.

Q. I will show you Defendant's Exhibit "E" and will ask you if that picture does, or does not, correctly show the condition of the air pipe line which is south of the rail, at the time the picture was taken?

A. It does.

Q. Then you say that air pipe line had been there, in your best judgment, since about 1919; how long had Mr. Coogan worked on the run, on trains 91 and 92, to your knowledge, I don't mean continuously, but off and on?

A. I think, roughly, for five or six months with the exception of the time he was on a work train running between Austin and Calmer.

Q. Had Mr. Coogan been working on trains running into and out of the Farmington yards, all through the Farmington yards prior to that time?

A. Yes.

Q. And for how long a period?

A. From the time the Farmington yards were built, which was about 1908.

Q. Now, then, train 91, just explain in a general way where that train comes from and to where and the average time run of that train?

A. Might I submit the I. and M. time table to cover that?

Q. Is the I. and M. time table correct as to the time it arrives at destination?

A. Not as to the arrival, but approximately as to the leaving trains.

Q. What time does it arrive at Austin?

[fol. 113] A. What time does it arrive?

Q. What time does it leave Austin, rather?

A. Seven forty-five A. M.

Q. And what time is it due at Farmington under the schedule, as refers to the situation on July 14, 1923?

A. One forty-five P. M.

Q. Whether or not that train ordinarily arrived at Farmington, at that time, and, if not, the approximate time it would average?

A. It would probably average about three P. M., arriving at Farmington.

Q. Then, I understand it would arrive at Farmington during the day time?

A. Ordinarily.

Q. When that train 91, comes into Farmington, where it is put.

A. The west cars are put on the pick up track in the old yards.

Q. What do you call the yard in which Mr. Coogan was killled?

A. The new yard.

Q. A man coming in on train 91, would he have occasion to go into the new yard?

A. In putting that train away they would put their west cars in the pick up tracks of the old yard. The caboose is left in the old yard; the H. and D. and Mankato cars on destination tracks in the new yard and the engine goes into the round-house in the new yard.

Q. When they come into the new yard how do they enter? Have [fol. 114] you a certain track, and if so, what do you call it?

A. They would come down and back the train in there and back it down this lead to leave the cars on destination tracks.

Q. Ordinarily the caboose would be on the head end of the train?

A. No, the caboose is not on the train, it is left in the old yard.

Q. But there would be some member of the crew riding in on the head end of the train?

A. Yes.

Q. And whose duty would that be, the head brakeman or the rear brakeman?

A. We just insist on one member of the crew.

Q. Sometimes it was the head brakeman and sometimes the rear?

A. Sometimes.

Q. When they come into the yard, they come into it over a lead track?

A. Yes.

Q. As I understand, from that lead track there are a large number of tracks branching off of it?

A. Yes.

Q. And the first track south of the main line is track one?

A. Yes.

Q. The tracks are numbered consecutively to the south?

A. Yes.

Q. In your best judgment, how far would you say it was from the switch, from the lead track which leads down on to track one; [fol. 115] how far is it from that switch down to the nearest point or nearest end of this air pipe line, approximately?

A. It would have to be a guess entirely, because I am hazy on that.

Q. Can you see this air pipe line from the lead track?

A. You can if you stand south of one track.

Q. What?

A. If you stand south of one track, track 1.

Q. What I am getting at is this, a man coming on a train which is being pushed in on the lead track; assuming he is on top of the rear car, can he observe the air pipe line?

A. He can see it.

Q. Train No. 92, what is the leaving time of that train from Farmington?

A. Seven o'clock.

Q. What time does the road crew usually report for duty for that train?

A. Six-thirty.

Q. And where is that train ordinarily made up, on what track?

A. In the new yard, on the main line, track 1, 2 or 3 sometimes. Ordinarily on the main line or track 1.

Q. And on any one of those tracks can this air pipe line be easily seen from any of those tracks?

A. When the tracks are clear of cars.

Q. Were you in court when Mr. Murphy or Mr. Odekirk was on the stand and testified with reference to a bend or bulge in the air pipe line, which he said was west of the body?

[fol. 116] A. Yes.

Q. Do you recall seeing such a bend or bulge in the pipe?

A. Yes.

Q. Where was that in reference to the body?

A. I would say between forty and fifty feet west of the body.

Q. That bulge, I take it, would not be shown in any of these pictures which you have testified were taken on that morning?

A. No.

Q. That would be farther west, that is correct?

A. Yes.

Q. Now, then, Mr. Leib, there is one thing I am not quite clear on and I want you to explain it to us. That is, take any car, any freight car, and we will say that the track runs east and west, and take the west end of the car, on which side would the air hose be with reference to the draw bar, north or south of the draw bar?

A. South of the draw bar.

Q. Then, as I understand it, those air hoses are put in on the cars in such a relation that if you went up alongside we will say, of this train No. 92, on the west end of each single car you would have the air hose on the south side of the draw bar?

A. Yes.

Q. And if you went on the north side of the train and on the rear of each car, the air hose would be on the north side of the car, the rear end or east end of the car?

A. Yes.

[fol. 117] Q. When you make a train up the air hoses are exactly the same on each car?

A. Yes.

Q. I will ask you this then, if a man were coupling up the air on any car of this train, and he went in between the cars from the south

side, having in mind this train 92, what would be the natural position for him to face, back or toward the head end of the train, going in from the south side?

A. Face back.

Q. If he went in from the north side of this same train, between any one of the cars, what would be the natural position for him to face, ahead or back?

A. Ahead.

Q. Now, then, I note here on Defendant's Exhibit "F" which you stated was the second and third cars ahead of the ca' oose, I will ask you there where the air hose is on the second car ahead of the caboose, south or north of the draw bar?

A. South.

Q. And with reference to the air hose on the third car, south or north of the draw bar, the rear end of the third car?

A. North of the draw bar.

Q. You get to the Farmington yards quite frequently?

A. It is under my supervision.

Q. And have you had occasion to observe the condition of the tracks and air pipe line at that point?

A. I have.

[fol. 118] Q. I will ask you if the air pipe line was in a different or substantially the same condition for a period, we will say, of five or six months before this accident?

A. It was in substantially the same condition.

Q. You would not say it was in exactly the same condition?

A. No.

Q. But your recollection is that it was substantially the same?

A. Yes.

Cross-examination.

By Mr. Sheehan:

Q. What is the air pipe line for that you speak of in this case?

A. To test air on the trains.

Q. I thought the air pipe line had to couple the engine on?

A. Yes.

Q. That air pipe line has not been used for that purpose for a couple of years, has it?

Mr. Erdall: That is objected to as immaterial.

The Court: Overruled.

Mr. Erdall: Exception.

A. It has not been used.

Q. Since about two years ago your yardmaster was taken out, and the inspectors?

A. The yardmaster was taken out before that.

Q. Over two years ago?

A. Yes.

Q. And most of your inspectors was in the habit of using the air pipe line?

[fol. 119] A. It was not put in service from the time it was put in.

Q. In no use there at all?

A. No, it has not been used.

Q. And that line as normally first put in, was on top of the ties outside of the south rail just about twelve to thirteen inches?

A. Yes.

Q. And fastened down to the ties by iron clamps; the iron clamps extended over the pipe and fastened it down on to the ties?

A. There were clamps at some points and at other points track spikes.

Q. But the pipe was fastened down on to the ties?

A. Yes.

Q. And the pipe rested on the ties?

A. Yes.

Q. How far did those ties extend outside of the rail, about fifteen inches?

A. Approximately.

Q. The pipe was supposed to be about fifteen inches?

A. Yes.

Q. You don't know whether you took Exhibit "D" or whether it was taken by somebody else, whose name you mentioned?

A. Could I see the exhibit? Some of them I took. No, that is one I am not sure whether I took it or whether the man who was with me.

Q. Exhibit "D"?

A. Yes.

[fol. 120] Q. You were there when it was taken?

A. Yes.

Q. With what kind of a machine was it taken?

A. With a kodak that I borrowed of this man who was with me.

Q. Either you or the other man held the kodak; in what position did you hold it; how far was the man from the car when he held the kodak?

A. May I see the picture?

Q. Do you remember?

A. I don't remember Exhibit "D."

Q. Exhibit "D" is the photograph of the caboose and the first car attached to it.

A. It was taken right up close. I could judge from looking at the picture.

Q. Where do you judge he stood?

A. That he stood on about track 5, when he was taking it.

Q. Three tracks south of track 1, so he must have been back of that?

A. Yes, back of the third track.

Q. Do you know how high he held the camera?

A. In about the middle of his body (indicating).

Q. Exhibit "C," you took that picture yourself; that is of the automatic couplings?

A. Yes.

Q. Exhibit "E," did you take that yourself?

A. That is one of those I am not sure whether I took or whether Mr. Gerster took.

Q. That was taken from an angle?

A. Yes.

Q. How far were you standing with the instrument when that [fol. 121] was taken?

A. The instrument was held in relatively the same position and probably a car length from the rear of that car.

Q. Now, you say that that pipe line was practically in the same condition five months before the accident as it was the day of the accident?

A. It was; there was no material change in the condition.

Q. And you speak about a bulge in that air pipe line?

A. Yes.

Q. And you say that it was about forty or fifty feet west of where the body lay?

A. That is my recollection. However, I did not go back to it.

Q. Did you notice the bulge?

A. Yes.

Q. What do you mean by bulge?

A. This particular pipe was visibly bulged. The pipe was bulged up.

Q. And in?

A. Slightly in.

Q. I show you Plaintiff's Exhibit "D," and ask you if that illustrates the bulge?

A. The bulge in this picture looks emphasized more than my recollection is of the bulge at the time.

Q. That is probably on account of the position in which the camera was held?

A. Possibly.

Q. But it was a bulge of that character?

[fol. 122] A. My recollection is that the pipe was not moved so much toward the rail as this.

Q. Plaintiff's Exhibit "E," does that more nearly illustrate it?

A. No, it still looks as though there were more of a bulge than I recollect.

Q. About how much difference was there in the appearance; how much was it bulged, about how many inches?

A. Probably three inches.

Q. Probably three inches?

A. Probably three inches, yes.

Q. Then, if it was twelve inches in its normal condition, it would be about nine inches in your opinion?

A. Yes.

Q. If you are taking a picture right at the bulge, the focus further on would show an unnatural distance between the bulge and the normal condition?

A. No, I would not say as to this photograph. My recollection as to the actual condition at the time was about three inches, and this photograph looks like more than that. I am no photographer. I know nothing about pictures.

Q. You heard the testimony in reference to the bulge that it was seven or eight inches from the south rail?

A. Yes.

Q. And that normally the pipe is about twelve inches, that is correct?

A. I heard that statement made here, but is not correct according [fol. 123] to my recollection.

Q. The normal condition?

A. Yes, but his statement as to the position of the pipe at that time was not correct.

Q. Seven or eight inches?

A. Yes.

Q. You think it was nine inches?

A. Nine inches or more.

Q. You did not measure it?

A. No.

Q. Outside of that, that you think this position is more than nine inches to the rail, this photograph is a fair representation?

A. Yes.

We offer both Exhibits "D and E" in evidence.

Mr. Erdall: May I ask him a few questions for the purpose of laying a foundation?

Q. Mr. Leib, I will ask you whether or not that pipe can be, where it is bulged, whether it can be bent one way or the other, or whether it is fastened so that you cannot bend it?

A. That bulge could be bent, yes.

Q. By hand?

A. You could put your foot against it.

Q. Then, I understand your testimony is that this photograph does not correctly show the condition of the pipe line at the time that you observed it shortly after the accident?

A. Yes.

Mr. Erdall: We object on the ground that there is no foundation laid.

The Court: Sustained.

[fol. 124] By Mr. Sheehan:

Q. It correctly represents it, except that you think it is closer?

A. Yes.

Q. In other words, you think the pipe was nine inches instead of what you believe this appears to show?

A. I did not say nine inches, Mr. Sheehan, but in that neighborhood.

Q. It might have been a trifle less, maybe more?

A. More, if anything.
Q. You did not measure it?
A. No.
Q. And for what distance was that pipe; it was up some distance from the ties?
A. Yes.
Q. Did you measure the distance up?
A. No.
Q. Did you notice the condition of the ballast between the ties at that point?
A. Not at that point at that time.
Q. Have you since?
A. I made an inspection of everything in that yard about once a week or so.
Q. That probably is in the same condition today as it was then?
A. Approximately.
Q. A gravel ballast is what it is?
A. Yes.
Q. You would not say how far it was bulged up from the ties?
A. No.
[fol. 125] Q. And you think it was bulged in about three inches toward the south rail?
A. Yes.
Q. And that covered a distance of how long?
A. Probably twelve or fifteen feet.
Q. That bulge was less at the extreme end?
A. Yes.
Q. As to height and as to the closeness to the ties?
A. Yes.
Q. At the extreme ends where the bulge started both upward and inward, it was slight, and continued until the extreme height was at the center?
A. Yes.
Q. Now, you say, when coupling an air hose, a man stands, he takes the position with one foot inside of the rail and the other outside?
A. Yes.
Q. And sometimes men step inside of the rail with both feet?
A. Yes.
Q. The normal, natural way for men working around a train is to do their work as near as they can facing the front of the train?
A. With that exception.
Q. The natural, normal way for men working about trains doing their work, generally speaking, is to do their work facing the train?
A. Facing the engine, yes.
Q. And that is for what purpose?
A. To keep track of the part of the machinery that is going to cause the train to move.
[fol. 126] Q. And it is a better way of protecting themselves, than to turn their back to anything from which movement is coming?

Mr. Erdall: It is immaterial, as to the position
The Court: Overruled.

A. Yes.
Q. And that is the reason, that is the general practice when they work to face the front of the train?
A. As I said before, with the exception of the air hose.
Q. And that is the reason they generally take the position facing the front of the train whenever they can, and do their work as appropriately and effectively?
A. Yes.
Q. Now, then, we will come to the point where you want his back to the train; you say he generally faces the angle cock when he is making this coupling?
A. Yes.
Q. For what reason?
A. That is the easier way to make the coupling.
Q. Why do you mention angle cock?
A. That is my personal observation.
Q. They sometimes step to couple, sometimes with both feet inside of the rail and sometimes one in and one out?
A. Yes.
Q. It is two foot, four inches from the center of the draw bar to this rail?
A. Yes.
[fol. 127] Q. What is there objectionable——
A. It is also thirteen inches from the center of the draw bar to the center of the angle cock where the air hose is coupled on to the coupling.
Q. It is two foot, four inches and a quarter from the center of the draw bar to this first rail?
A. Yes.
Q. You say the natural way for him to stand is to have his left foot in?
A. When he is making the coupling on the south side.
Q. To have his left foot in?
A. Yes.
Q. And facing the angle cock?
A. Yes.
Q. Why should he face that?
A. Well, he can reach the air hose hanging from the opposite car more easily.
Q. Here, your air hose here is on this side; here is your rail, and here is your other air hose, and you think you can reach it just as readily with your right foot out and with your left foot in, in every case in working around a train?
A. That has been my experience.
Q. How long since you have railroaded?
A. Thirty years.
Q. Operating trains?
A. The last switching I did was two years ago.

Q. How long did you switch?
A. A couple of months.
Q. Is that the way you always went in, with your back to the engine?
[fol. 128] A. I don't recall making a coupling while I was doing *that* switching.
Q. What would your supervisor say to you if you were seen doing that?
A. What I would say to one of my men?
Q. That he had better learn railroading?
A. No.

Redirect examination.

By Mr. Erdall:

Q. Now, then, Mr. Leib, I will ask you to take Defendant's Exhibit "F" and step down before the jury and explain to them; as I understand the air hose is the same on Exhibit "F" as it is on Exhibit "D," and explain to them why you would face the rear of the train in making that coupling.

Mr. Sheehan: That is objected to as repetition
If you think there is something omitted; we don't want to repeat.

Q. Mr. Leib, we will take for the purpose of argument, we will say that this is the first car ahead of the caboose; that the caboose is right here; that I am standing on the south side of the track; that the air line runs in an angle like that. Now, then, Mr. Leib, have you ever seen a man step in between the cars with his right foot in and grab the hoses that way and pull them together; have you ever seen a man do that and can a man do that without getting his head up against the draw bar?
A. I have seen a man do that but it is a very very awkward operation.
Q. As I understand it, with a condition such as that, he steps in [fol. 129] from the south side with his right foot outside and his left foot inside and gets down and grabs the air hose which is on the head car, or the car to the west, and couples them together under the draw bar?
A. Yes, that is the natural way.
Q. I will show you Defendant's Exhibit "G," and will ask you what that photograph is; when it was taken and by whom and what it represents?
A. It was taken by me personally at the time the other pictures were taken. It was taken from underneath the third car ahead of the caboose, just ahead of the rear trucks, looking back toward the caboose.
Q. Looking east?
A. Yes.

Q. Does that, or does it not, represent the condition between tracks as to the ballast, etc., on track number one, at that place and at that time?

A. It represents the condition just as it was.

Defendant's Exhibit "G" is offered in evidence.

Mr. Sheehan: There is no objection.

The Court: Received.

The large photographs, "D-1," "E-1," "F-1" and "G-1," are marked by the reporter, to correspond with Exhibits "D," "E," "F," and "G" already marked.

By Mr. Sheehan:

Q. What is that on the top of the picture?

A. That is the brake beam on this pair of wheels, that is the rear wheels of this truck.

Q. But it is the front truck?

A. The rear truck of this car. The object of that picture was to [fol. 130] show that opening where the hat was found; the hat was found in about there—and also to show the condition of the ballast at that particular point.

Q. The hat was found between the opening of the second and third cars?

A. The rear of that car looking back.

Q. The rear truck is the truck next to the caboose?

A. Toward the caboose.

Intermission of ten minutes.

Mr. LEIB recalled:

By Mr. Erdall:

Q. I will ask you, Mr. Leib, whether or not you have a copy of the rules, which applies to trainmen, which was effective in July, 1923, have you?

A. I have.

Q. I will ask you whether or not a man holding the position that Mr. Coogan did, whether or not he would be required to be familiar with the rules in that rule book and more particularly with reference to rule 903 and rule 908?

A. He would.

Q. Now, then, Mr. Leib, I will ask you whether it is customary to examine trainmen from time to time to find out whether or not they are familiar with the rules in that book?

A. They are re-examined every two years on the Milwaukee.

Q. And have you, yourself, ever examined Mr. Coogan prior to [fol. 131] July, 1923?

A. I have re-examined him on the rules.

Q. You did not examine him the first time, but you have re-examined him?

A. I also examined Mr. Coogan on the standard rules when he was made a conductor under those rules. He was made a conductor under the old rules, but those rules became effective after I was trainmaster for the division on which he worked, consequently, I examined him on those rules.

Mr. Erdall: We offer rules 903 and 908 in evidence.

Mr. Sheehan: I don't think they are material, but I am not going to object.

The Court: If there is no objection, they may be received.

Mr. Erdall reads rules 903 and 908 to the jury.

Cross-examination.

By Mr. Sheehan:

Q. Speaking of this air pipe line, that is an iron pipe?
A. Yes.
Q. How large is it?
A. I would say one and an eighth inch.
Q. Nearly an inch and three-quarters, isn't it?
A. I would not say it was that large.
Q. You would not say it was?
A. My recollection is that it is one and an eighth or one and a quarter inch pipe.
Q. You have been down there pretty frequently?
A. I have, yes.
[fol. 132] Q. You had better look at it the next time.

Mr. Erdall: I object to counsel's remarks.

William J. Delhanty, being called, was duly sworn and testified as follows on direct examination by Mr. Erdall:

Q. Your name is William J. Delhanty?
A. Yes.
Q. Where do you live, Mr. Delhanty?
A. Austin, Minnesota.
Q. You are employed by the Milwaukee?
A. Yes.
Q. For how long have you been so employed?
A. A little over six years.
Q. And you knew Mr. Coogan during his life?
A. I knew him for quite a while.
Q. On July 14, 1923, what were you doing on that day?
A. I was braking on 92.
Q. On train No. 92?
A. Yes.
Q. Were you of the same crew he was?
A. Yes.

Q. I understand he was a rear brakeman and you were a head brakeman?

A. Yes.

Q. Now, then, Mr. Delhanty, when was the last time you saw Mr. Coogan alive?

A. It was after the caboose was drawn down on No. 1 track. I was talking to him about five minutes after the caboose was going, or had gone down.

[fol. 133] From that time did you see Mr. Coogan again before his death?

A. No.

Q. What were you doing, in a general way, from that time up to the time you learned of Coogan's death?

A. I was at the west end of the yards waiting for a train to be made up.

Q. And when was the first that you learned that there had been an accident?

A. Mr. Dubke was the first one that gave the alarm.

Q. You heard him holler, as he testified?

A. Yes.

Q. After you heard him holler, what did you do?

A. I started to walk down alongside of the train.

Q. Was there anyone with you?

A. Mr. Murphy.

Q. That is Mr. Murphy, or Mr. Odekirk, the gentleman who was on the stand?

A. Yes.

Q. You knew him by the name of Murphy?

(No answer.)

Q. And did you or Mr. Murphy, or either of you, go down as far as the body at that time?

A. No.

Q. Where did you stop?

A. It was about three or four car lengths, I am not sure. Somewhere in that neighborhood.

Q. West of the body?

A. Yes.

Q. Where did Mr. Murphy stop?

[fol. 134] A. The same place I did.

Q. What was the occasion for your stopping?

A. I did not want to see him. We could see the body laying there and I said I did not want to see him.

Q. Did Mr. Murphy give any reason for not proceeding?

A. He said, "I don't like to see dead people, either."

Q. What did you and Mr. Murphy do then?

A. Turned back and walked up.

Q. Toward the head end of the train?

A. Just a little ways. We stood there and talked.

Q. Did you subsequently go back to the body?

A. Not until after it was covered.
Q. It was covered over with a canvas?
A. Yes.
Q. And Mr. Delhanty, were you present when those pictures Mr. Leib testified to, were you present when those were taken. Look at the pictures so you will know; were you present; did you see Mr. Leib and some one else taking some pictures?
A. I remember of them taking the pictures, but don't remember of seeing them doing it. I remember of the men being around there.
Q. You remember you saw the men on the morning of the accident?
A. Yes.
Q. I will ask you if, up to that time, the train had been moved; any portion of the train, excluding the engine, had been moved [fol. 135] after Mr. Coogan's body was found, up to the time those pictures were taken?
A. After the body was found? No.
Q. You were in the vicinity of the train?
A. Yes.
Q. When was the train first moved, to your best recollection?
A. Right after the statements from each man were taken and everything was adjusted, they notified us we could move the train.
Q. Who took the statements?
A. Mr. Ward.
Q. And the conditions were left in the way they were up to the time he came there, with the exception of taking the body away?
A. Yes.
Q. After the statements had been taken, etc., the train was moved?
A. Yes.
Q. Do you know about what time it was that the train was moved?
A. I don't remember.
Q. Well, was it ten minutes after the accident, or an hour or several hours?
A. It was quite a while after.
Q. Was it moved in the morning or afternoon?
A. Pretty close to noon before we got out of there, before we left Farmington.
Q. Had you worked on this particular job before?
A. Yes.
Q. And you had worked with Mr. Coogan?
[fol. 136] A. Yes.
Q. Had you made up this particular train on track 1, at other times?
A. Yes.
Q. You heard Mr. Leib's testimony to the effect that train No. 92 is made up on the main line, on track 1, track 2, and occasionally on track 3, but ordinarily on track 1 and the main line, is that correct?
A. Yes.

Cross-examination.

By Mr. Sheehan:

Q. When you walked back there and Mr. Odekirk was with you, you went to within three or four car lengths and stopped?
A. Yes.
Q. You said you did not want to see the body?
A. Yes.
Q. You did not stay there all the time?
A. We stood there just a little while.
Q. And you were there a short time when a rain coat or something of that kind was put over the body?
A. A canvas.
Q. A very short time after?
A. During the time we were up in the other yards.
Q. During the time until the train was moved you were all around there a considerable period of time?
A. Yes.
[fol. 137] Q. You went back to the rear end of the train while the body was there and covered?
A. After it was covered.
Q. You were back at the rear end of the train; you did not notice where each member of the two crews were and the other people, and what they were doing?
A. No.
Q. You did not pay any particular attention?
A. No.
Q. You were excited?
A. Yes.
Q. You were nervous on account of the shock?
A. Yes.
Q. And Ward, one of the claim agents, was there?
A. Yes.
Q. And Mr. Leib, trainmaster?
A. Yes.
Q. That is all.

E. F. PALMER, being called, was duly sworn and testified as follows on direct examination by Mr. Erdall:

Q. Your name is E. F. Palmer; where do you live?
A. Minneapolis.
Q. What is your business?
A. It is general car foreman for the north end of the Milwaukee.
Q. Does the Farmington yards come within your jurisdiction?
A. It does.
[fol. 138] Q. How long have you worked for the Milwaukee?
A. Over five years.
Q. Five years?
A. Yes.

Q. Have you worked for any other railroad?
A. Yes.
Q. How long have you been railroading?
A. Twenty-three years.
Q. I will ask you if you are familiar with the constructing and purpose of constructing air pipe lines in railroad yards?
A. I am.
Q. I will ask you what the purpose of such air pipe lines is?
A. The purpose of air lines is to expedite the movement of trains through the yards. That is, we use the air from a pipe instead of using it from the engine, waiting until the engine comes on to the train.
Q. What men use that air pipe line with reference to coupling; what do you call them?
A. Car men.
Q. Are those men under your jurisdiction in the Milwaukee Railway in this district?
A. Yes.
Q. I will ask you how the air pipe line is constructed; whether it is constructed between the rails or outside?
A. It is fastened on outside of the rails, in most cases.
[fol. 139] Q. Will ask you whether it is constructed on top of the ties or on the outside?
A. There have been cases where they are fastened down outside, and on top, also.
Q. Where are they generally fastened?
A. On top of the ties.
Q. What is the reason for connecting them on top of the ties?
A. It gives better access to the pipe, and also keeps it from corroding.
Q. Any other purpose for putting it on top of the ties?
A. It is more accessible to repair it.
Q. How about the ties?
A. If the pipe was at the end of the tie or underneath the ties, it would interfere with keeping up of the ties, and it would run into a heavy cost.
Q. I understand then, that if you had to take out the ties, and if they had the air pipe line below the surface of the ground, it would interfere with taking out the ties?
A. Yes.
Q. With the air pipe line on top of the ties, it will not interfere materially with taking out the ties, except such ties as are actually attached to the pipe line?
A. Yes.
Q. Is that the general custom, or is it generally true that in railroad yards they do have pipe lines of this character, or not?
A. We have pipe lines in almost all of the yards in my district.
[fol. 140] Q. How about the other roads that you have worked for, do they have pipe lines, or don't they?
A. Yes.
Q. Who put in this pipe, if you know; what department?

A. Our department.

Q. What was the purpose in putting it in at Farmington?

A. That was a terminal and we have those pipes in at terminal points.

Q. You have them at terminal points?

A. Yes.

Q. And the fact that you do or do not have car repair men in the yards, does that have any effect upon the question as to whether or not you have air pipe lines in the yard?

A. Not that I know of.

Q. You put them in in terminal yards?

A. Yes, in terminal yards.

Q. Now, then, Mr. Palmer, are air pipe lines put in at the same distance from the rails or at different distances from the rails, in different yards?

A. There is a variance. Pipe lines are generally put in according to the condition of the yards.

Q. You have heard the testimony that some one testified to, that this pipe line was approximately a foot from the rail, the south rail of track 1; do you know of instances, or have you seen air pipe lines in railroad yards where the pipe line is farther than that from the rail?

A. As I stated, they sometimes put them on the outside of the ties at the end.

Q. On the top?

[fol. 141] A. No, on the outside.

Q. Do they, or do they not, put them on the actual edge of the ties?

A. Very seldom.

Q. Do they put them on the ties closer to the rail than one foot?

A. Yes.

Q. That distance varies, in various yards?

A. Yes.

Q. Do you know what the diameter of this air pipe line was?

A. An inch and a quarter, but the outside is an inch and three-quarters.

Q. The inside, an inch and a quarter?

A. Yes.

Q. When they use those air pipe lines, I understand car men have a hose, a long hose which they attach to various points along the pipe?

A. Yes.

Q. Do you know when this particular pipe line was put in?

A. I cannot state definitely, but it was put in somewhere in the neighborhood of four years ago.

Q. Something like four years ago?

A. Yes.

Q. And does that pipe line constitute a part of the equipment of that particular yard?

A. It does.

Q. You understand they have a number of tracks there in that ard?
A. Yes.
Q. Do you know whether they have at the present time, or in
fol. 142] July, 1923, had occasion to use all of the tracks there, r not?
A. There have been times that they have not used all of them.
Q. Are they at the present using all of the buildings?
A. No.
Q. You have been present in court during the entire trial?
A. I was here yesterday afternoon and a part of this morning.
Q. Did you hear the testimony of Mr. Leib to the effect that the ardmaster had left the Farmington yards?
A. Yes.
Q. And do you maintain any car men at Farmington now?
A. We have one man.
Q. And do you know whether or not the company expects to have, n the future, expects to have occasion to have car men at the Farmgton yards, again or not?
A. If the terminal is again opened up we will have car men there.
Q. And has the company, or has it not, kept up general repairing n the yards?
A. General repairing to the cars or to the yards?
Q. To the yards.
A. Yes.
Q. Is there any intention of taking up this particular pipe line ow?
A. Not at the present time.
fol. 143] Q. Do you consider it as a part of the facilities in that rticular yard?
A. I do, as part of the equipment to that particular terminal.
Q. Now, then, Mr. Palmer, have you had any experience in upling and uncoupling cars?
A. Yes.
Q. And have you had opportunity to observe others doing that ork?
A. Yes.
Q. Now, then, I will show you Defendant's Exhibit "D" and -1", which purports to be a picture of the general situation; one ing an enlargement of the other, and Defendant's Exhibit "C", hich the witnesses have described, were the caboose and the first car ead of the caboose of train 92, on the day of this accident; and it s been testified that the caboose was on the east end of the train d that the photograph was taken looking north; now assuming that is is the correct situation and assuming that a man goes in to couple cars, between the caboose and the first car ahead of the caboose this particular train; I will ask you if you know the natural posion that a man takes in doing that work; assuming now that he es in with one foot inside and one foot outside of the rail?
A. He figures taking the left foot; the left foot inside of the rail.

Q. What, or rather why would he do that in this particular instance?

A. It is the most natural way that a man would place himself;]fol. 144[it is the natural position for a man to enter a place of this kind.

Q. And is there any other reason for doing that?

A. I could give you my reason for doing it. It gives me a freer opportunity to get myself away in case something should happen. I have a better change of slipping out from in between the cars.

Q. Assuming that you are going in to couple up the air between those cars, you would go in with your left foot inside and your right foot outside?

A. Yes.

Q. For instance, if there are several cars in a string and cars are shot back on to the end of the string, and assuming that you are going in to couple up the air between those cars as they are shot, you would go in with your left foot inside of the rail and your right foot outside?

A. Yes.

Q. And do you ordinarily have any worry that cars are being shot back?

A. There are certain positions that you could hear the slack in the train.

Q. What causes the slack?

A. The draw bars coming together.

Q. The draw bars compress and that makes a noise?

A. Yes.

Q. If you go in with one foot inside of the rail, and the situation is just as described in that picture, you go in with your left foot inside of the rail and have your right foot outside and you are facing the [fol. 145] train, you would immediately jump out if you hear anything?

A. Yes.

Q. Just demonstrate to the jury; assuming this is the first car ahead of the caboose, this is the south side of the car; just demonstrate to the jury why, in your judgment, it would be dangerous for a man to go in and couple up the air, putting his right foot in with his left foot out.

A. (The witness demonstrates to the jury.) The engine is up ahead; the air pipe line runs across this way, and this is the south side of the car. A man naturally coming along, he walks toward the engine and he comes this way. The first step he takes is with his left foot and he gets down and reaches over and grabs hold of this hose and takes the one behind him and works them together and when he has done that he comes up and is facing this way. In case he should want to get out in a hurry he would jump out this way. If he was in this way, he would have to back and it would be difficult.

Q. Step in that way again; explain how you would get a hold of the air coupling of the caboose?

A. You would have to grab it with your right hand and you would be working with your back this way; this would be a cramped position.

Q. Would there be anything there to interfere with your face?
A. The draw bar would naturally come in line with your head.
Q. Have you, or have you not, observed men coupling up cars in that manner, stepping in with their right foot inside and their left [fol. 146] outside?
A. I have, but it is a very rare occasion.
Q. The customary way is for a man to step in with his left foot?
A. Yes.
Q. That is true whether from the north side or the south side?
A. Yes.
Q. Mr. Leib testified that men occasionally go in with both feet inside of the rail; is that a customary way of coupling up cars?
A. There are times that a man does go in with both feet.
Q. When he goes in with both feet, assuming that he goes in from the south side, and assuming the situation to be as you testified before, the caboose on the east and the air uncoupled; what way would he naturally face, toward the head end or rear end?
A. He would naturally face toward the angle cock on that particular car.
Q. The angle cock in the caboose in this particular instance?
A. Not if he was going east.
Q. He is not going east.
A. No, it would be the angle cock of the caboose.
Q. And if you are going in from the north side, you would naturally face toward the angle cock of the car ahead of the caboose?
A. Yes.

Cross-examination.

By Mr. Sheehan:

[fol. 147] Q. You have been with the Milwaukee for five years?
A. Yes.
Q. In what capacity have you been employed by them during that period?
A. Car foreman, general car foreman and district car foreman.
Q. What are your duties in that connection?
A. I have supervision of men working in the train yards.
Q. That has been your work ever since?
A. Yes.
Q. What road were you with before you came to the Milwaukee?
A. St. Louis.
Q. You mean the Minneapolis and St. Louis?
A. Yes.
Q. How long were you with them?
A. Two years.
Q. In what capacity?
A. Car foreman.
Q. The same that you occupy with the Milwaukee?
A. Not at the present time, no.
Q. But your work was along the same line?

A. Along the same line, yes.
Q. And what company were you with prior to that?
A. With the Great Western.
Q. How long were you with them?
A. Fifteen years.
Q. In what capacity were you employed by them when you left [fol. 148] them?
A. I had supervision of the terminal shops.
Q. How long were you in that position?
A. I could not give you the exact dates, about a year and a half.
Q. What did you do before that with the Great Western?
A. Machinist.
Q. How long were you machinist with the Great Western?
A. I don't know. I would have to study it out.
Q. About how long, if you know?
A. A few years.
Q. Six or seven years?
A. Not that long.
Q. Five?
A. About two.
Q. What was your work with the Great Western before that?
A. I was, prior to that time, in charge of the building repairs and setting up machinery.
Q. How long were you in that work?
A. A little better than a year.
Q. And what was your work before that?
A. Assistant freight car foreman. Assistant to the freight car foreman.
Q. How long were you in that work?
A. About five years.
Q. What was the nature of that work?
A. Had to do with everything connected with repairing of cars.
Q. What was your work before that with the Great Western?
[fol. 149] A. Call boy. I worked on repair tracks prior to this time. Started out as a call boy.
Q. That was your first railroading?
A. Yes.
Q. After you were call boy, what was your next work?
A. I started in as call boy and worked on the section a while and on repair tracks.
Q. How long were you on the section?
A. Two or three months.
Q. And then you worked on the repair tracks?
A. Yes.
Q. Repairing cars?
A. Doing all kinds of work; office work, cleaning and repair work.
Q. Were you ever braking?
A. A student.
Q. Switching?
A. I have done switching, but never was a switchman.

Q. You were never employed in that capacity?
A. No.
Q. You were never a brakeman?
A. I said a while ago I made a student trip but got no compensation for it.
Q. You speak about the working of air pipe lines; did the Great Western have any air pipe lines on its ties?
A. I could not swear to that now.
Q. Do you know how the North Western has theirs?
[fol. 150] A. No, I don't.
Q. Do you know how the Great Northern or Northern Pacific have theirs?
A. Some on top of the rails; on top of the ties.
Q. You say those are constructed on top of the ties, sometimes closer to the rail?
A. Yes.
Q. Some of them are constructed out half way between, where you have two tracks, such as one and two?
A. Yes, out in the center in the track under the ground.
Q. And some of them are right under the ties?
A. Under the ties, no.
Q. Have you seen them that way?
A. No.
Q. Do you know of another road that has its pipes constructed on top of the ties within a foot of the rail?
A. I could not say offhand.
Q. This pipe line was put in for the purpose of having yard men test the air in cars?
A. That is what it was put in for.
Q. So that the air could be tested in the cars before the engines were attached?
A. Yes.
Q. There is a hose that is connected to the train line and connected to the pipe?
A. Yes.
Q. That pipe lays flat when not in use?
A. Yes.
Q. And when they want to use it they take hold of it and raise it up?
[fol. 151] A. No. It can be raised but that is not what they do.
Q. They can attach the hose to it without raising it?
A. It is already attached.
Q. They attach another to that to connect with the train?
A. Yes.
Q. That pipe line, you heard Mr. Leib testify has never been in use in that yard?
A. That statement is not the fact, because the air line has been used.
Q. It has not been used the last couple of years?
A. Yes.

Q. It has not been used the last couple of years?
A. Oh, no.
Q. It was used just before they took the yard crew out of there?
A. It was used while we had our forces there.
Q. You say you have one car man there now?
A. Yes.
Q. And his duties are in connection with passenger trains?
A. Mostly passenger, and light repairing.
Q. He has nothing to do with freight cars in the yards, or testing the air?
A. He has nothing to do with testing the air.
Q. He has nothing to do with testing the air?
A. Just light repairing.

Redirect examination.

By Mr. Erdall:

[fol. 152] Q. During your railroading experience, have you had occasion to couple and uncouple cars and if so explain when that has been.
A. That has been all through my life. I have been around cars all my life.
Q. Just what, in a general way, has been your experience?
A. When I was assistant foreman my duty was to see that the switching was properly taken care of and it was up to me to take care of the movements, and there were times that the man in charge of the engine would want to go off some place, at some special time, and he would ask me to follow the engine, so I would take his place and go ahead and do his work.
Q. And have you in connection with your work had considerable opportunity to observe switchmen and brakemen in coupling and uncoupling cars?
A. In a general way, yes.

John Hemsey, being called, was duly sworn and testified as follows on direct examination by Mr. Erdall:

Q. What is your business?
A. General freight car foreman at the present time. General freight car foreman department.
Q. You are in the same department as Mr. Palmer?
A. Yes.
Q. And as I understand, you are the next man to Palmer in that department?
A. Yes.
[fol. 153] Q. How long have you worked for the Milwaukee Road?
A. Thirty-six years.
Q. What has been the nature of your work during that time?
A. I started in at section repairing, section foreman, and also

started in as brakeman and car repairer, car foreman and general freight car foreman at the present time.

Q. Have you worked for any other roads?

A. No.

Q. And your territory is, I presume, the same as Mr. Palmer's?

A. No.

Q. What territory comes within your jurisdiction?

A. The Minneapolis Terminal.

Q. Farmington does not come within your jurisdiction?

A. No.

Q. Are you familiar with the manner of constructing air pipe lines in railroad yards, generally?

A. Yes.

Q. Have had an opportunity of observing them on other railroads?

A. I have seen them in other yards.

Q. Whether or not you have seen air pipe lines constructed on top of the ties and outside of the rails, in other railroad yards?

A. Yes.

Q. Ask you whether or not you noticed the air pipe line south of track 1, in the Farmington yards?

[fol. 154] A. I have.

Q. Have you observed air pipe lines attached to the top of the ties in substantially the same manner; I don't mean as to the same distance from the tracks, but the same manner as they are attached in the Farmington yards?

A. Yes.

Q. What is the purpose of having the pipe line on top of the ties?

A. So that they would be fastened to the ties instead of laying loose on the ground, and while they are on top of the ties they can be taken care of easier than if laid otherwise.

Q. It is easier to get at the pipe, is it?

A. Yes.

Q. Do they have air pipe lines in the yards which are under your jurisdiction, now?

A. Yes.

Q. Do they have some of those air pipe lines on top of the ties?

A. Yes.

Q. And outside of the rail?

A. Yes.

Q. And I presume they are at various distances from the rail?

A. There is no standard.

Q. You heard Mr. Palmer's testimony with reference to the fact that he stated this pipe line was an inch and a quarter inside and an inch and three-quarters outside; would that be your idea as to the size?

A. That is the size we use in general.

[fol. 155] Q. What do you call that pipe?

A. Inch and a quarter pipe.

Q. Now, Mr. Hemsey, I will ask you whether or not you were at Farmington on July 14, 1923?

A. I was.

Q. What was the occasion of your going there?
A. I went down with Mr. Ward in connection with this accident.
Q. About what time did you get there?
A. I should judge between ten and eleven; somewhere around ten; between ten and eleven. I could not say as to the exact time. I paid no attention to it.
Q. Did you see the body at that time?
A. No.
Q. The body had been removed?
A. Yes.
Q. Did you make any inspection of the train?
A. Yes.
Q. What was the purpose of that inspection?
A. To find out if all the safety appliances and the general condition of the cars was in good condition.
Q. Did you make any particular inspection of the condition of the road bed or this pipe line?
A. Yes.
Q. Did anyone point out to you the location of the body?
A. Yes.
Q. Do you remember who that was?
A. There were several trainmen there, but I am pretty sure it was Mr. Leib.
[fol. 156] Q. The trainmaster who was on the stand?
A. Yes.
Q. Now, then, did he show you where the hat was, etc.?
A. It was called to my attention.
Q. By men standing there?
A. Yes.
Q. Did you make an inspection of the air pipe line in that immediate vicinity?
A. Yes.
Q. What was the condition of the air pipe line, we will say ten or twelve feet west of the location where the body was?
A. In good condition.
Q. Did you observe any place where the pipe was bent or bulged?
A. Yes.
Q. West of that?
A. Yes.
Q. West of where the body lay?
A. Yes.
Q. And approximately how far was that?
A. Between twenty-four and twenty-five feet.
Q. You would say twenty-four or twenty-five feet?
A. Between twenty-four and twenty-five feet.
Q. And approximately how far west did, or would you say it was of the point where they showed you that the hat lay?
A. Fifteen feet.
Q. Fifteen feet west of that?
A. Yes.

[fol. 157] Q. I show you defendant's Exhibits "E" and "E-1" and ask you if you know what that picture represents?

A. Yes.

Q. And do you recall any of the people in that picture?

A. Yes.

Q. Which ones?

A. I recall myself.

Q And which one is that?

A. The first picture.

Q. The one with the hat on?

A. Yes.

Q. Who is the other gentleman here?

A. Now, I do not know.

Q. But you were present when that picture was taken?

A. Yes.

Q. Would you say this picture does or does not correctly represent the condition of the air pipe line?

A. Yes.

Q. Within the scope of the picture?

A. Yes.

Q. And does it, or does it not show the air pipe line west of the point where they pointed out to you that the hat had been picked up?

A. It would not go back that far.

Q. Where the hat was picked up?

A. No.

Q. Where did they point out to you that they picked the hat up?

[fol. 158] A. Just about under the trucks. That is not seen in this picture.

Q. Under the trucks?

A. Yes.

Q. Do you remember who pointed it out to you?

A. No, it was mentioned in general.

Q. Where they pointed out to you where the hat was, was that east or west of where this bulge in the pipe started?

A. East.

Q. And I believe you testified that it was approximately fifteen feet, or am I correct in that, the distance from the hat to where the bend started in the pipe?

A. About ten feet.

Q. Now, then, did you observe the nature or this bend or bulge?

A. I did.

Q. Just describe it.

A. The pipe was bulged toward the rail and it also appeared to be bulged up, but the bulge, where it appeared to be bulged, was resting on the tie.

Q. You are referring to the time you inspected it immediately after you appeared on the scene?

A. Yes.

Q. How far would you say that air pipe line was out from the south rail of the track?

A. I should judge it was bent possibly three inches.

Q. You would say in toward the track three inches?
A. Three inches.
[fol. 159] Q. How far was the pipe out from the south rail of track one at the point of the accident?
A. That was twelve inches.
Q. As I understand it, where the pipe was bent there at the greatest point, you would say it was about nine inches?
A. Yes.
Q. Now, then, during your railroading experience, have you had occasion to couple and uncouple cars?
A. Yes.
Q. Have you had considerable work along that 476 line?
A. Yes.
Q. Have you had opportunity and have you observed switchmen and trainmen doing that work?
A. Yes.
Q. And I presume you have also observed car men doing that work?
A. Yes.
Q. Now, then, you have supervision of the men who are repairing cars?
A. Yes.
Q. And I presume you know how cars are constructed?
A. Yes, I should.
Q. And I will ask you if the air line is put in the same way on each car, that is as to its location, with reference to the draw bar?
A. Yes.
Q. And I will ask you when a train is made up whether or not the air hose on the head end of each car will be on the same side [fol. 160] of the draw bar, or not?
A. Yes.
Q. And the air hose on the rear end of each car is also put on the same way?
A. Yes.
Q. Now, then, I show you Defendant's Exhibits "D" and "D-1", and "C," were you present when those pictures were taken?
A. I was.
Q. Do they correctly represent the situation at Farmington at the time you first saw the train?
A. Yes.
Q. They represent the situation at the time the pictures were taken?
A. Yes.
Q. The train was not moved when you saw it?
A. No.
Q. Assuming that a man is going to make an air coupling between the caboose and the first car ahead of the caboose, I will ask you what the natural position for a man in doing that work would be?
A. He would step in with his left foot and his right foot outside of the rail, also quite a number of men, especially men of small size,

will step in with both feet, but a man of large size where there is not so much room would step in with the left foot and the right foot outside.

Q. Assuming that a man steps in either way you describe, either with both feet or with the left foot inside and the right foot outside, between the cabosse and the first car ahead of the caboose and [fol. 161] with the condition as shown on that picture; would the man's general direction be toward the head or rear end of the train?

A. Rear end.

Q. And if he were going in from the north side, what would be the general direction?

A. Toward the head end.

Cross-examination.

By Mr. Sheehan:

Q. You have no rule directing which foot a man should put inside of the rail and which can be kept out, in coupling air?

A. Not that I know of.

Q. And according to your observation, it depends a good deal upon the man which foot he uses?

A. It all depends; men will go in with their left foot first. They are what we call an experienced man. And men who just begin railroading and make their first coupling, they will go in anyway.

Q. But experienced men always go in the other way?

A. Yes, with the left foot first.

Q. That is your opinion?

A. I see them every day.

Court adjourned until two o'clock P. M.

Charles Binko, being called, was duly sworn and testified as follows on direct examination by Mr. Erdall:

Q. What is your business, Mr. Binko?

A. Yard foreman, in yards at Hastings.

Q. How long have you been employed by the Milwaukee Rail- [fol. 162] road Company in that capacity?

A. I have been here about ten years.

Q. How long have you worked for the Milwaukee Railroad Company?

A. Off and on for about twenty years.

Q. And in what capacities?

A. Braking and switching and yard foreman.

Q. Your railroading experience has been along that line practically exclusively?

A. Yes.

Q. In connection with that work I assume you have considerable coupling and uncoupling of cars to do?

A. Yes, I have.

Q. And coupling and uncoupling of air between cars?

A. Yes.

Q. And men under your jurisdiction have a great deal of that work?

A. Yes.

Q. And you have considerable experience in coupling and uncoupling air on freight equipment for how long?

A. You don't get so much of it in yard service, as in train service, but I have done a lot of it.

Q. That is true for a good many years?

A. Yes.

Q. Now, then, Mr. Binko, taking a train of freight cars and is the air on the same side of every car when it comes into the yard?

A. Yes.

Q. And in other words—I will withdraw that. But if you would [fol. 163] go from one care up to the next car in the string, in other words, all along one side the air would be on the same end of the car?

A. Yes.

Q. And that would be true throughout the entire train?

A. Yes.

Q. Now, then, I would like to have you come down here; just step in here; we will assume, Mr. Binko, that this table represents a box car, and we will assume that the judge's bench represents another box car or a caboose; now, then, what I would like to have you do is just step down here and show the jury how you would go in to couple up the air?

A. If this was the end of the car I would step in that position to take hold of the hose.

Q. Do you always step in with that same foot?

A. I always do; have the rail between your two feet and stoop in that position to get hold of the hose.

Q. If you were over here on the opposite side of the train, just show us how you would step in and couple up the cars from the opposite side?

A. In the same way, because I am right-handed and can take hold of the hose in the same position.

Q. What I want to know is this, when a man steps in between the cars, does he usually step in with one foot or sometimes both feet between the rails?

A. I suppose sometimes they do if they are coupling up, but I don't.

Q. You always step in with one foot?

[fol. 164] A. Generally always one foot in and one out.

Q. What foot do you have in?

A. My left foot.

Q. Have you observed other men coupling cars?

A. Well, I have.

Q. And I will ask you what foot do you notice them step in with?

A. I have seen quite a number in the same position I just mentioned here.

Q. Do you recall having seen anyone step in with their right foot first?

A. Not that I know of. I don't know as I have ever seen anybody step in that way.

Q. Now, then, Mr. Binko, I will show you Defendant's Exhibits "D" and "D-1," and I will ask you what, in your opinion, would be the natural position for a man to stand in, in coupling up the air between the caboose and the first car ahead of the caboose, shown in that exhibit; what I want to know particularly is whether he would face toward the caboose or face toward the car ahead of the caboose, or where he would face?

A. I always use my left hand to reach over and get the opposite hose. I don't know whether anybody else does that or not. I always get a hold of the opposite hose with the left hand and pull it over.

Q. Assuming that you are approaching the train and going in to couple, would you face the head end or the rear end of the train?

A. I would be facing the rear end if I am going to couple up.

[fol. 165] Q. Now, then, will you state, if you know, any reason why a man would not step in with his right foot ahead to couple up cars?

A. I don't know of any reason why they would not.

Q. Now, then, if you step in with your right foot to couple up the air, would you have any part of your body under any portion of the draw bar or the air hose or anything of that kind, in your judgment?

A. Your shoulders would be almost directly under the caboose train line or under the hose.

Q. By the train line you mean the iron pipe that comes out that the air hose connects on?

A. Yes.

Q. If you step in with your left foot first, would you be under any portion of that?

A. You would not be, because the train line is on the opposite side. The train line is on the opposite side from you and your shoulders would not be near anything.

Q. Would the fact that your shoulder was under, say you step in with your right foot and your shoulder was under the air pipe line of the caboose, assuming the condition we have in this picture, would that, in your judgment, affect your ability to get out from between the cars if anything should happen?

A. You probably would get caught on the hose; the hose would catch you and pull you down.

Cross-examination.

By Mr. Sheehan:

[fol. 166] Q. What hose?

A. The air hose.

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Q. On which car?

A. On the side you are working on.

Q. That would be the caboose in this case?

A. On the caboose side.

Q. Is there anything improper in a man coupling up the air hose, to step in with his right foot instead of the left?

A. I always do.

Q. Is there anything improper in your stepping in with the right foot instead of the left?

A. You have a better chance.

Q. It is more convenient for you, personally, to do that because you are right handed; it would be more convenient for a left handed man to do it with his right foot first?

A. I don't know.

Q. You say in your direct examination that you step in with your left foot because you are right handed; would it be more convenient for a left handed man to step in with his right foot than his left foot?

A. I just told you what I know about it. It is convenient for me to do it that way.

Q. It would not be improper for any other man?

A. That is up to him.

Q. You don't say they don't do that?

A. I don't know.

Redirect examination.

By Mr. Erdall:

Q. As I understand you, you say you never have seen a man [fol. 167] step in with the right foot first; you don't recall?

A. I don't know as I have.

Q. I would like to have you show the jury, if you will, just how you would place your hands in coupling up that air hose, assuming this is the end of the car.

A. That is the end of the car—I step in across the rail and get the hose on the opposite side and bend the hose up and make the coupling. The hose has to be bent up before it comes into place. I always bend it up to make the coupling.

Q. Assuming that you get in with your right foot?

A. I never do that. I don't know as I could bend the hose up and make it any easier for myself. I cannot make a coupling that way.

Mr Erdall: At this time the defendant offers to take the jury down in the yards and show them just exactly so that they can observe the air hoses themselves and see just what the situation is. It is pretty hard to explain; it might be instructive and we would be glad to have men demonstrate how to mak a coupling. The plaintiff might have one and we will have one to show how it is done.

The Court: I don't believe we want to do that.

Defendant rests.

Testimony closed.

Mr. Erdall: At this time the defendant wishes to make a motion.

The jury is excluded from the court room.

[fol. 168] Mr. Erdall: At this time the defendant moves the court to direct a verdict for the defendant on the ground that no actionable negligence has been shown and that any verdict would have to be speculative and conjectural, and that the evidence conclusively shows that Mr. Coogan, the deceased, assumed the risk.

The Court: I am inclined to think the court better submit it to the jury and get a verdict. I think I will let it go to the jury. Motion denied.

By Mr. Erdall: Defendant excepts to court's ruling.

The jury is called back to the court room.

The Court: You may proceed, gentlemen.

The case was summed up to the jury by the respective counsel, and thereupon an adjournment was ordered until December 13, 1923, at nine o'clock A. M.

December 13, 1923, session pursuant to adjournment.

Charge to Jury

Ladies and Gentlemen of the Jury: Under our system of trying lawsuits, the duty of the jury and that of the court is entirely separate and distinct. It is the duty of the court to preside at the trial, to determine all questions that arise in the course of the trial and at the conclusion of the trial to submit to the jury the disputed questions of fact and submit those questions to the jury for their determination, and it is the exclusive province and duty of the jury to determine what the facts are.

[fol. 169] Now, in this case, there are many facts that are not in dispute at all. It fairly appears that the defendant company owns and operates and did so own and operate on July 14, 1923, a railroad from Minneapolis to Farmington and also from Farmington to Austin, as well as to other points both in and outside of the state of Minnesota. It also appears that in July, 1923, one William Coogan was in the employ of the defendant company, as a brakeman, and that in the morning of the 14th day of July, 1923, he was working for defendant in its yards at Farmington. It also appears that he was preparing to assist in taking a train from Farmington to Austin and that he was assisting in making up the train at Farmington when he was run over by some freight car or freight cars, and killed. This action is brought by Edith F. Coogan, as special administratrix of his estate to recover damages from the defendant company, claiming that the defendant company caused his death by wrongful acts or omissions on its part.

Now, in the first place, ladies and gentlemen, I want to caution you that not every accident that results in injury to some one furnishes a proper basis for an action for damages. The mere fact that

there was an accident and thereby the plaintiff was injured, is no reason why the defendant should be required to respond in damages therefor. There is such a thing as an unavoidable accident, that is, one that could not have been avoided by the exercise of reasonable care and prudence, and in such case no one is liable because no one is [fol. 170] to blame. It is only where, in the eyes of the law, some one to blame for an accident and for the resulting injury, that such person should be held liable in damages therefor. The law requires every employer of others to exercise reasonable care to provide for his employees a safe and suitable place in which to work. As applied to this case, the law requires the defendant company to exercise reasonable care to see that its premises, its yards where its employees were required to perform this work, were in a reasonably safe and suitable condition for such work. A failure to exercise reasonable care to that end makes them liable for any damages resulting from such failure. Bear in mind that the law does not require the employer, the railroad in this case, to guarantee the safety of its employees, but simply it must exercise reasonable care to see that its premises are in a reasonably safe condition for the work.

Now, it appears that the defendant company kept and maintained, as a part of its equipment in its said Farmington yards, a certain pipe or air line, which lay along the track on which the train was then being made up, and which lay about twelve inches outside of the south rail of said track. Now, the plaintiff's charge is that said pipe or air line was permitted to become in a loose, unfastened, warped, bent and dangerous condition and in too close proximity to the rail of the track. That is the particular negligence charged by the plaintiff in this case against the defendant and that will be the first question for you to determine; did the defendant fail to exercise [fol. 171] reasonable care to keep its yards in a safe and suitable condition and by that failure permit the pipe to become in the condition that plaintiff charges it is in. The plaintiff affirms that proposition; the defendant denies it, and that is the first disputed question of fact for you to determine. The burden of proof is upon the plaintiff to establish the facts as she claims they are, by a fair preponderance of the evidence, and by a fair preponderance of the evidence is not meant the greater number of witnesses but the greater weight and credibility of the evidence. If you find that proposition in favor of the plaintiff, that is that the defendant failed to exercise reasonable care to keep its yards in a suitable condition, then you will consider the case further, but if you fail to find that proposition in favor of the plaintiff, that ends the case and you may consider it no further, because in that case the defendant would not be liable. If you find that proposition in favor of the plaintiff, then the second point is this, did William Coogan come to his death by reason of getting his left foot fastened under the pipe line in the manner claimed by the plaintiff. The plaintiff asserts that was the method or manner of his death; the defendant denies it. Here again, the burden of proof is upon the plaintiff to establish the facts as she claims they are. Bear in mind that that is the only charge which the plaintiff makes, it is that specification. The particular manner as charged in the

complaint is as follows: "That by reason thereof, that is, by reason of the condition of the pipe, the said William Coogan's left foot became [fol. 172] caught and securely fastened beneath said air pipe line, thereby causing him to be thrown to the ground and caught by the rigging used in connection with the wheels of said car coupled to said caboose, thereby causing the wheels of said car to come in contact with said William Coogan's body, causing him serious injuries from which he shortly thereafter died."

Counsel on both sides have called your attention to the fact that there is no direct evidence as to how William Coogan came to his death, that is, that there were no eye witnesses of the accident, but you are instructed that direct testimony is not indispensible. In cases of his kind the facts may be proved by circumstantial evidence, provided that the circumstantial evidence furnishes a reasonable basis for belief of the facts constituting liability. In this case you will take into consideration all of the facts and circumstances disclosed by the evidence and if from a full and fair consideration thereof you are naturally and fairly led to the belief that William Coogan met his death by being caught with his left foot under the pipe line in the manner claimed by plaintiff, then you will find for the plaintiff on that question. You are not permitted to guess or to conjecture or to imagine that he met his death in that manner, neither is it sufficient that the facts and circumstances are consistent with plaintiff's theory; they must be more than consistent; they must furnish a reasonable basis for the conclusion on your part that he met his death in the manner claimed by the plaintiff. If you so find, then your verdict [fol. 173] will be for the plaintiff as far as this point is concerned; if you do not so find, then your verdict must be for the defendant. Now, if you find that the defendant was negligent or that the defendant failed to exercise reasonable care in furnishing a suitable place in which the said William Coogan could do his work, and you find that that failure resulted in the condition of the pipe line, as claimed by plaintiff, and that the injury occurred as claimed by plaintiff, then your verdict will be for the plaintiff, unless you find that the defense, or what is known in law as assumption of risk, which is interposed by the defendant in this case, is true, and that defense is this—it is the law that where an employee or servant knows of a defect or a danger himself, in connection with his work, and appreciates such danger, or where it is so obvious as to be plainly seen and appreciated by him, and he still continues his employment without protest, he is held to have assumed that risk and if he is then injured by reason thereof he cannot recover therefor, on the theory that he has knowingly assumed the risk. Now, the defendant claims that if this pipe line had gotten into such a condition that it was a danger or menace and that its existence and condition were known to William Coogan and appreciated by him, just as well as by the employer, the defendant company, and that, therefore, he assumed the risk thereof and cannot recover. The plaintiff denies this, and that is a question for you to determine. If the defendant's contention here is true, that is a complete defense to liability in this case, and if [fol. 174] such is true, your verdict must be for the defendant. The

burden of proof is upon the defendant to etsablish this defense as it claims it to be, that is, to establish that either the plaintiff knew of and appreciated this risk or else that it was so obvious that he must have presumed to know of it and appreciate it and, therefore, he could not recover.

Now, if, under these instructions, you find for the plaintiff, you will then come to the question of damages. On the question of damages I can give you no exact rule by which you can measure damages in cases of this kind. It is a matter that is left very largely to the good judgment and discretion of the jury. The purpose of an action of this kind is to compensate in this case the widow and children for the pecuniary loss which they have suffered by reason of the death of the husband and father. Nothing can be allowed fo. grief or suffering in these cases. The question is, what pecuniary loss did the beneficiaries suffer by reason of the death of William Coogan. In determining this question you will take into consideration his earning capacity, his age, his habit of industry, or the contrary, his health, whatever the evidence may disclose, his disposition to contribute to or support his family, his expectancy; a table of expectancy has been introduced in evidence showing his expectancy, or rather showing the expectancy of a normal man in good health of his age, to be 28.90 years. That does not mean that his expectancy was necessarily that length of time, but it is a matter that you may [fol. 175] consider with the rest of the evidence. In determining the probability of financial assistance that those beneficiaries would have received had he not been killed, you may also consider the probability of his earning capacity during the period of whatever expectancy he may have, also the age of his various children and of his widow. All these matters and all other facts and circumstances disclosed by the evidence should be considered by you in determing the amount of damages, if you find for the plaintiff. An annuity table has been introduced in evidence, showing the amount of money at this time that would be required to furnish an income of a dollar a year during the period of expectancy of a man of the age of William Coogan at the time of his death. That, too, may be considered by you in determining what amount, in your judgment, constitutes, the pecuniary loss which has been sustained by these beneficiaries.

The forms of your verdict will be, "We, the jury, impaneled and sworn in the above entitled action, find for the plaintiff and asses her damages at — dollars," filling in the amount, provided you find for the plaintiff. If you find for the defendant, your verdict will be, "We, the jury, impaneled and sworn in the above entitled action, find for the defendant."

During the first twelve hours of your deliberation you can only render a verdict by making that verdict unanimous. However, the law provides that after twelve hours' deliberation you may then render what is known as a five-sixth verdict, that is, ten or eleven of [fol. 176] your number may then render a valid verdict. If your verdict is a unanimous verdict, it should be signed by your foreman and by him only. If it is a five-sixth verdict it should be signed by all who concur in the verdict and not signed by your foreman, as

foreman. If, however, he is one who concurs in the verdict he should sign it with the rest of you. When you retire to consider your verdict, select one of your members as foreman or forewoman and when you have agreed upon a verdict, notify the bailiff and he will conduct you into court. If, however, you should not arrive at your verdict until after the court has departed and court has adjourned, and you then arrive at your verdict, you may then place the verdict in an envelope, seal it up and leave it in the possession of your foreman, and in that case you meet in your jury room tomorrow morning at nine o'clock when you will be conducted into court.

These questions that I have submitted to you, ladies and gentlemen, must, of course, be decided upon the evidence that has been produced here and should be decided upon the facts disclosed by the evidence and according to the law as laid down by the court. It is encumbent upon the jury to accept the law as given by the court. You should not be swayed by sympathy but adhere entirely to the evidence as disclosed by the witnesses upon the stand. You are the sole judges of the truthfulness of the witnesses and of the weight to be given to their testimony. You are not to accept the testimony of witnesses passively and follow it blindly, but it is your duty to con- [fol. 177] sider it with care, subject it to your judgment and experience and accept it only so far as it seems to you to be reasonable and true. If you believe from the testimony that any witness has wilfully and knowingly testified falsely with respect to any material fact, you are then at liberty to disregard the testimony of such a witness with respect to other matters; but you are the sole judges and you may believe or disbelieve his testimony in regard to other matters accordingly as you deem it worthy or unworthy of belief. You will, of course, not count the witnesses and render your verdict in accordance with the majority, but weigh the evidence and return your verdict in accordance with the truth. You will take into consideration the interest of the witnesses in the result of the action; their appearance upon the witness stand; the manner in which they gave their testimony and all facts and circumstances disclosed by the evidence, and give to the testimony of each witness just such weight as you deem it entitled to, and no more.

The Court: Any suggestions, gentlemen?

There were no suggestions offered by respective counsel.

The Court: The clerk will swear the bailiffs.

The jury retired to the jury room at nine-twenty o'clock A. M., and at four-twenty o'clock P. M., of said day returned a verdict finding for the plaintiff and assessing her damages at $13,500.00.

[fol. 178] NOTICE OF SETTLED CASE

To Messrs. T. D. Sheehan and H. J. Goodwin, attorneys for palintiff, St. Paul, Minnesota:

You will please take notice that the foregoing, consisting of one hundred eighty-eight (188) pages of typewritten matter, is hereby proposed as and for the settled case herein.

Dated February 8, 1924.

F. W. Root, C. O. Newcomb, and A. C. Erdall, Attorneys for Defendant, 25 Milwaukee Station, Minneapolis, Minnesota.

STIPULATION RE OF SETTLED CASE

It is hereby stipulated and agreed by and between the attorneys for the respective parties, that the foregoing, consisting of one hundred eighty-eight (188) typewritten pages, may be settled and allowed as the settled case herein except the exhibits which may be used by either party on appeal.

Dated February 8, 1924.

T. D. Sheehan and H. J. Goodwin, Attorneys for Plaintiff.
F. W. Root, C. O. Newcomb, and A. C. Erdall, Attorneys for Defendant

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[fol. 179] IN DISTRICT COURT OF DAKOTA COUNTY

ORDER. SETTLING CASE

After reading and examining the foregoing proposed case and finding the same to contain all the evidence adduced or offered and proceedings had on trial of the above case and to be conformable with the truth, the same is hereby settled and allowed as and for the settled case herein.

It is further ordered that all of the exhibits on file with the clerk of the District Court may be used by either side on appeal, the same as though made a part of the settled case.

Dated March 1st, 1924.

Willard L. Converse, District Judge.

IN DISTRICT COURT OF DAKOTA COUNTY

NOTICE OF MOTION TO SET ASIDE VERDICT

To Messrs. T. D. Sheehan and H. J. Goodwin:

Please take notice that at the court house in the village of Hastings, in Dakota county, state of Minnesota, on the 16th day of February, 1924, at 9:30 o'clock in the forenoon or as soon thereafter as

counsel can be heard, the defendant will move the court for an order setting aside and vacating the verdict of the jury heretofore returned herein and ordering judgment for the defendant notwithstanding said verdict.

That said motion will be made and heard upon the settled case and upon all the papers and proceedings filed or had in said action.

That the grounds of said motion are as follows:

[fol. 180] That the court erred:

I

1. In denying defendant's motion for judgment made at the close of plaintiff's opening statement to the jury.

2. In denying defendants motion as the close of all of the testimony for a directed verdict in favor of defendant.

II

That the verdict is not justified by the evidence and is contrary to law.

Dated February 8, 1924.

F. W. Root, C. O. Newcomb, and A .C. Erdall, Attorneys for Defendant. 25 Milwaukee Station, Minneapolis, Minnesota.

In District Court of Dakota County

Order Denying Motion to Set Aside Verdict

The above entitled matter came on for hearing before the undersigned at Hastings, Minnesota, on the 1st day of March, 1924, upon a motion for an order setting aside and vacating the verdict of the jury heretofore returned herein and ordering judgment for the defendant notwithstanding the verdict. A. C. Erdall, Esquire, appeared for the defendant in support of said motion, and T. D. Sheehan, appeared in opposition thereto. The matter was duly argued and submitted, and now, to-wit: this 5th day of March, [fol. 181] 1924, the court having duly considered the matter, it is

Ordered, that said motion be, and the same hereby is, in all respects denied.

Willard L. Converse, District Judge.

On March 10th, 1924, judgment in favor of the plaintiff against the defendant in the sum of $13,744.50 was entered, filed and docketed.

In District Court of Dakota County

Notice of Appeal

To Messrs. T. D. Sheehan and H. J. Goodwin, attorneys for plaintiff, and to T. S. Ryan, Esq., clerk of said District Court:

Please take notice, that the above named defendant hereby appeals to the Supreme Court of the state of Minnesota from the judgment in favor of plaintiff and against defendant entered and filed by said District Court, in the above entitled matter on the 10th day of March, 1924, and from the whole thereof.

Dated this 11th day of March, A. D. 1924.

F. W. Foot, C. O. Newcomb, and A. C. Erdall, Attorneys for Defendant, 25 Milwaukee Station, Minneapolis, Minnesota.

Due and personal service of the above notice of appeal is hereby acknowledged this 12th day of March, A. D. 1924, and the plaintiff [fol. 182] hereby waives any bond or undertaking on this appeal and hereby agrees that all further proceedings in this case on the part of the plaintiff shall be stayed in all respects as if all bonds and undertakings provided by law had been duly given.

T. D. Sheehan and H. J. Goodwin, Attorneys for Plaintiff.

In District Court of Dakota County

Judgment—Filed March 10, 1924

The above entitled action came on duly to be tried by the court and a jury duly empanelled and sworn on the 11th day of December, 1923.

T. D. Sheehan, Esq., appeared as attorney in behalf of the plaintiff and A. C. Erdall, Esq. as attorney in behalf of the defendant.

The court, having tried said action and submitted the same to the jury, and said jury having rendered its verdict thereon on the 13th day of December, 1923.

Now, therefore, pursuant to said verdict and on motion of T. D. Sheehan, Esq., as attorney for the plaintiff.

It is hereby ordered and adjudged, that the plaintiff recover of the defendant the amount, with interest thereon, found and specified in said verdict, together with the costs and disbursements in said action allowed and taxed as follows, to-wit:

Principal sum allowed in said verdict	$13,500.00
[fol. 183] Interest according to said verdict	198.00

Costs and Disbursements:

Statutory costs allowed	$10.00
Sheriff's fees	1.20

Jury fees:

Fees of the clerk of this court	7.50	
Otto W. Engelbert, Hastings Minn.	1.12	
Frank Jeffers, Austin, Minn.	13.00	
L. N. Gephart, Lakeville, Minn.	3.64	
J. J. Regan, Lakeville, Minn.	3.64	
P. J. Odekirk, Minneapolis, Minn.	5.40	
Thos. J. Moran, Hastings, Minn.	1.00	
Total costs and disbursements	$46.50	$46.50
Total amount of judgment		$13,744.50

Dated March 10th, 1924.

T. S. Ryan, Clerk.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 184] In District Court of Dakota County

Assignments of Error

Defendant, deeming itself aggrieved by the judgment in the above entitled action, entered on the 10th day of March, 1924, in connection with its appeal to the Supreme Court of the State of Minnesota from said judgment, does hereby assign the following errors, which errors occurred in the entry of said judgment in said cause and in the proceedings prior thereto and upon which it relies for reversal on this appeal.

I

The court erred in permitting a recovery herein upon rights asserted under the Federal Employer's Liability Act, April 22, 1908, C. 149, 35 Stat. 65, as amended April 5, 1910, C. 143, 36 Stat. 291.

II

The court erred in submitting to the jury the question as to whether or not defendant permitted the air pipe line to become in a loose, unfastened, warped, bent and dangerous condition and in too close proximity to the railroad track for the reason that no [fol. 185] evidence in the case shows or indicates that William Coogan at the time of his death was at the point where said air pipe line was defective and there is no evidence in the case which shows or indicates that William Coogan's left foot ever came in contact with said air pipe line at the point where it is claimed it was defective or at any other point or ever became caught or fastened underneath said air pipe line at the point where said air pipe line was

alleged to be defective or at any other point and no evidence in the case shows or indicates that said air pipe line proximately contributed to Mr. Coogan's injuries or death or had anything whatever to do with such injury or death.

III

The court erred in submitting to the jury the question as to whether or not William Coogan came to his death by reason of getting his left foot caught or fastened under the air pipe line for the reason that no foundation or basis for such finding exists in the evidence.

IV

The court erred in submitting to the jury the question whether or not the defective air pipe line proximately contributed to William Coogan's death for the reason that no evidence in the case will support such a finding or conclusion.

V

The court erred in permitting the jury, under the Federal Employer's Liability Act, to return a verdict in favor of the plaintiff on account of the death of William Coogan for the reason that the [fol. 186] cause of William Coogan's death was and is speculative and conjectural and no direct or substantial evidence in the case shows or indicates the manner in which Mr. Coogan met his death.

VI

The court erred in submitting the question to the jury as to whether or not William Coogan under the Federal Employer's Liability Act assumed the risk of the alleged improper construction and alleged careless and negligent maintenance of the air pipe line in an unsafe condition near the track in question for the reason that the undisputed evidence shows that the air pipe line was in substantially the same condition for a period of five or six months before the accident as it was at the time of the accident and William Coogan for a period of three or four months prior to the accident had worked practically continuously on the same run and train No. 92 the train crew of which he was a member and the train involved in the present case, that said train was very frequently made up on the same track that it was made up on on the day of the accident and Mr. Coogan was thoroughly familiar with the location and condition of the air pipe line in question at the time of the accident and the risks incident to the defective maintenance or construction of the air pipe line were open and obvious to William Coogan and were well understood by him and as a matter of law he assumed the risk under the Federal Employer's Liability Act.

VII

The court erred in denying defendant's motion for a directed [fol. 187] verdict made at the close of all of the testimony and upon the ground that the evidence in the case wholly fails to show that the claimed breach of duty on the part of the defendant with respect to the improper construction and careless and negligent maintenance of the air pipe line near the track on which the accident occurred, proximately caused or contributed to William Coogan's injuries and death.

VIII

The court erred in denying defendant's motion for a directed verdict made at the close of all of the testimony and upon the ground that the evidence is not sufficient to constitute a cause of action or right of recovery in favor of the plaintiff and against the defendant under the Federal Employer's Liability Act or under any Federal Act.

IX

The court erred in denying defendant's motion for a directed verdict made at the close of all the testimony and upon the ground that the evidence is conclusive that under the Federal Employer's Liability Act, William Coogan assumed all risks to himself caused by the alleged improper construction and careless and negligent maintenance of the air pipe line.

X

The court erred in denying defendant's motion for a directed verdict made at the close of all the testimony and upon the ground that under all the evidence in the case the cause of William Coogan's death is speculative and conjectural.

[fol. 188] XI

The court erred in denying defendant's motion for judgment made at the close of plaintiff's opening statement to the jury.

XII

The court erred in denying defendant's motion for a directed verdict in favor of the defendant at the close of all the testimony.

XIII

The court erred in denying defendant's motion for judgment notwithstanding the verdict.

IN SUPREME COURT OF MINNESOTA

No. 275

EDITH F. COOGAN, Administratrix, Respondent,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant

Dakota County. 24105. Dibell, J.

OPINION—Filed October 31, 1924

Syllabus

1. The evidence sustains a finding of the jury that the death of the plaintiff's intestate was caused by a bent air line negligently permitted by the defendant along a track in its yards.

2. The decedent did not as a matter of law assume the risks.

Judgment affirmed.

[fol. 189] Action to recover for the death of the plaintiff's intestate which occurred while he was employed by the defendant in the interstate commerce. There was a verdict for the plaintiff. The defendant moved for judgment notwithstanding. The motion was denied. Judgment was then entered for the plaintiff from which the defendant appeals.

The ultimate question is whether the trial court erred in denying the defendant's motion for judgment notwithstanding. This question involves two inquiries:

(1) Whether the evidence sustains the finding of the jury that the defendant's negligence caused the death of the plaintiff's intestate.

(2) Whether he assumed the risk.

1. The deceased was killed in the yards of the defendant in Farmington. The yard tracks run east and west. The deceased was at the east, on the south of the track. The theory of the plaintiff is that he was coupling or about to couple the air between the caboose and the rear car when a backward movement of the train, which was headed west killed him. Along the south side of the track, perhaps a foot from the southerly rail, was an air line made of iron pipe an inch or so in thickness normally attached to the top of the ties. For a distance of some fifteen feet the pipe was bent upward and inward toward the rail leaving a space of a few inches between it and the ties. The claim of negligence and the only one refers to the condition of the air line at this point. It is conceded that the question [fol. 190] of negligence was for the jury; but the defendant claims

that a casual connection between the defect and the decedent's death is not shown.

The burden of showing a causal connection is upon the plaintiff. Conjecture or speculation is not enough. The doctrine is easy of statement; its application is often difficult, and it is so here.

No one saw the accident. The decedent's badly mangled body was found near the south rail immediately after the last backward movement of the train. The plaintiff must prevail, if at all, upon the theory that as the decedent was engaged about the coupling of the air his left foot caught under the air line and that its defective condition was the cause of his death. Blood was upon the rear trucks of the rear car. There was some evidence of the dragging of the body along the track. The decedent's false teeth and his tongue and some flesh were found between the rails. The mutilation was mostly on the left side including the left side of the face. On the left side of the *defendant's* left shoe just above the heel was an indentation such as might have been made if it had been caught beneath the air line. There was evidence that the body was dragged along the track. The position of the body of a man who has met his death in a violent accident, or physical marks thereon, usually do not furnish persuasive proof of the manner of the occurrence. The exact conditions are difficult of ascertainment, and a living body is resistent. They are circumstances for the jury's intelligent [fol. 191] consideration. This thought is given expression by Judge Lees in Dushaw v. Great Northern Ry. Co., 195 N. W. 893:

"An inanimate object will fall in the same way whenever the circumstances are the same. But when a man finds himself falling he instinctively tries to save himself, and in so doing may get into surprising and unexpected positions. This was merely one of a number of circumstances to be considered by the jury."

Though the case is a close one we reach the conclusion that the finding of a causal connection between the bent air line and the death of the decedent has substantial evidence in its support. It is not necessary to review the federal or state cases. They are collected in Hurley v. Ill. Cent. R. Co., 133 Minn. 101; Thompson v. Minneapolis & C. R. Co., 133 Minn. 203 and MacIntosh v. Great N. Ry. Co., 151 Minn., 527. The MacIntosh case in its application of the law to the facts is as favorable to the plaintiff as any.

2. The evidence does not charge the decedent as a matter of law with the assumption of risks. Neither his knowledge of the conditions nor his appreciation of the dangers bring such result. The case is not ruled by Southern Pac. Co. v. Berkshire, 254 U. S. 415, relied upon by the defendant.

Judgment affirmed.

[fol. 192] IN SUPREME COURT OF MINNESOTA

[Title omitted]

STIPULATION RE JUDGMENT—Filed Nov. 13, 1924

It is hereby stipulated by and between the parties to the above entitled action that there be no remittitur to the District Court of Dakota county in the above entitled action.

It is further stipulated that if judgment is entered in this court, in favor of the respondent, the correct amount of said judgment, including interest and costs, should be fourteen thousand three hundred sixty-three and 29/100 ($14,363.29) dollars.

It is expressly stipulated and agreed that nothing herein shall be construed, as a consent by the defendant-appellant, to the entry of any judgment against it or as a waiver of its assignments of error in the entry of any judgment.

Defendant-appellant expressly reserving and claiming the right [fol. 193] to have all questions arising in the entry of said judgment and proceedings prior thereto reviewed by the Federal Supreme Court, if said court shall grant a writ of certiorari upon defendant's petition therefor.

Dated, November 13th, 1924.

T. D. Sheehan and H. J. Goodwin, Attorneys for Plaintiff-Respondent. F. W. Root, C. O. Newcomb, and A. C. Erdall, Attorneys for Defendant-Appellant.

The parties having stipulated that there be no remittitur to the District Court, the clerk will enter final judgment in this court in accordance with rule XX.

Samuel B. Wilson, Chief Justice of the Supreme Court of Minnesota.

[File endorsement omitted.]

[fol. 194] IN SUPREME COURT OF MINNESOTA

[Title omitted]

TAXATION OF COSTS—Filed Nov. 13, 1924

Costs and Disbursements

Statutory costs	$25.00
Printing brief	44.00
The above bill of costs and disbursements taxed and allowed Nov. 13, 1924, at	69.00

Grace F. Kaercher, Clerk Supreme Court of Minnesota, by Peter O. Scow, Deputy. (Seal.)

STATE OF MINNESOTA,
County of Ramsey, ss:

T. D. Sheehan, being first duly sworn, deposes and says, that he is *the* one of the attorneys for the respondent in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said respondent in the above entitled proceeding, and that all of the items of such disbursements have been actually and necessarily paid or incurred therein, by and on behalf of said respondent.

T. D. Sheehan.

[fol. 195] Subscribed and sworn to before me this 1st day of November, 1924. Lyle Pettijohn, Notary Public, Ramsey County, Minn. My commission expires Nov. 22, 1925. (Seal.)

SIR: Please take notice, that the costs and disbursements of the respondent in the above entitled action will be taxed by and before Grace F. Kaercher, clerk of the Supreme Court of Minnesota, at her office in the Capitol, at St. Paul, Minnesota, on Thursday, the 13th day of November, 1924, at 10:00 o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf of said respondent and inserted in a judgment in said action that will thereafter be entered.

Very respectfully, T. D. Sheehan and H. J. Goodwin, Attorneys for Respondent.

To F. W. Root, C. O. Newcomb, and A. C. Erdall, attorneys for appellant.

Service of the within affidavit of disbursements and notice of taxation of costs by delivery of copy thereof is hereby admitted at Minneapolis, Minnesota, this 10th day of November, 1924.

F. W. Root, C. O. Newcomb, and A. C. Erdall, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 196] IN SUPREME COURT OF MINNESOTA

[Title omitted]

PETITION FOR STAY

To the Honorable the Supreme Court of the state of Minnesota.

Defendant and appellant in the above entitled action most respectfully represents:

That it feels itself aggrieved by the decision and order for judgment of this court herein affirming the judgment of the court below and ordering the entry of final judgment in this court.

That defendant and appellant does therefore, desire in good faith to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this court, when entered, [fol. 197] and will use all due diligence to submit its petition and the record herein as soon as is reasonably possible.

Wherefore, defendant and appellant prays the order of this court staying all proceedings herein during the pendency of its application and petition to the Supreme Court of the United States for a writ of certiorari.

Dated November 13th, 1924.

Chicago, Milwaukee & St. Paul Railway Co., Petitioner, by F. W. Root, C. O. Newcomb, and A. C. Erdall, 25 Milwaukee Station, Minneapolis, Minnesota, Its Attorneys.

In Supreme Court of Minnesota

[Title omitted]

Order Staying Judgment—Filed Nov. 13, 1924

Upon application of the defendant and appellant in the above [fol. 198] entitled action:

It is ordered, that upon and after the entry of final judgment herein as directed by the court in its decision and order entered and filed on the 13th day of November, 1924; all proceedings herein and in the District Court of Dakota county, Minnesota, including the issuance of any writ of execution out of either court, be, and hereby are, in all things stayed pending the petition for a writ of certiorari to the Supreme Court of the United States and proceedings had thereon.

Dated, November 13, 1924.

Samuel B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

In Supreme Court of Minnesota

Judgment

Pursuant to an order of court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the court below, herein appealed from, to-wit, of the District Court for and within the county of Dakota, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of fourteen thousand three hundred sixty-three and 29/100 ($14,363.29) dollars, in this cause in this court and that execution may [fol. 199] be issued for the enforcement thereof.

Dated and signed November 13th, A. D. 1924.

By the Court,

Attest: Grace F. Kaercher, Clerk. (Seal.)

Statement for Judgment

Statutory costs, $25.00; cost of respondent's brief, $44.00; amount of judgment, $13,744.50; interest from March 10, 1924, to November 10, 1924, $549.79; total $14,363.29.

Filed Nov. 13th, 1924. Grace F. Kaercher, Clerk.

Certificate to foregoing paper omitted in printing.

[fol. 200] In Supreme Court of Minnesota

Clerk's Certificate

I, Grace F. Kaercher, clerk of the Supreme Court of the state of Minnesota, do hereby certify that the foregoing, consisting of 200 number of pages, is a true, correct and complete transcript of the record in the above entitled cause on appeal to this court, comprising the complete record on appeal from judgment entered in the District Court of Dakota county, first judicial district of Minnesota; and of all the proceedings had and taken in this court, the opinion of the court, together with the final judgment of this court entered on appeal from the judgment of said District Court.

In testimony whereof, I have hereunto set my hand and seal of the Supreme Court at my office in the city of St. Paul, Minnesota, this 31st day of January, 1925.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

[fol. 201] Supreme Court of the United States

On Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota

Order Granting Petition for Certiorari—Filed March 16, 1925

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Minnesota and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

Office Supreme Court, U. S.
FILED
FEB 9 1925
WM. R. STANSBURY
CLERK

No. 268

Supreme Court of the United States.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,*

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, TOGETHER WITH NOTICE OF APPLICATION AND ACKNOWLEDGMENT OF SERVICE THEREOF.

F. W. ROOT,
A. C. ERDALL,
Attorneys for Petitioner,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
O. W. DYNES, ESQ.,
Chicago, Illinois,
C. O. NEWCOMB,
Minneapolis, Minnesota,
On Brief for Petitioner.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

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Supreme Court of the United States.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner*,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent*.

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI.

To Messrs. T. D. Sheehan and H. J. Goodwin, her attorneys of record:

You and each of you are hereby notified that on Monday, the 2nd day of March, 1925, at the convening of court, or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States a petition for writ of ceritorari and brief in support thereof, praying the Honorable, the Supreme Court of the United States, to cause to be issued a writ of certiorari directed to the Supreme Court of the State of Minnesota and the District Court of Dakota county of said state, commanding said courts to certify to the United States Supreme Court, for review, a transcript of the record and proceedings of said District Court and said Supreme Court in

the cause entitled: "Edith F. Coogan, as Special Administratrix of the Estate of William Coogan, Deceased, Respondent, against Chicago, Milwaukee & St. Paul Railway Company, Appellant," being No. 24105 of the state Supreme Court of the state of Minnesota.

A true copy of petition for writ of certiorari and brief in support thereof are hereto attached and made a part hereof.

F. W. Root,
A. C. Erdall,
Attorneys for Petitioner,
25 Milwaukee Station,
Minneapolis, Minnesota.

Of Counsel:
O. W. Dynes, Esq.,
Chicago, Illinois,
C. O. Newcomb,
Minneapolis, Minnesota,
On Brief for Petitioner.

Service of the foregoing notice of submission and a copy of the petition for certiorari and brief in support thereof are hereby acknowledged this 3rd day of February, 1925.

W. Sheehan & H. J. Gardner
Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,*

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Now comes the Chicago, Milwaukee & St. Paul Railway Company and respectfully petitions this Honorable court to grant a writ of certiorari to the Supreme Court of the state of Minnesota and to remove therefrom to this court, for review, the record in the case, there lately pending, entitled: "Edith F. Coogan, as Special Administratrix of the Estate of William Coogan, Deceased, Respondent, against Chicago, Milwaukee & St. Paul Railway Company, Appellant," being cause No. 24105 on the docket of that court, the petitioner herein being the said appellant-defendant.

A duly certified copy and nine uncertified copies of the entire record, including all proceedings in the District Court of Dakota county, Minnesota, where the said cause was tried, and in the Supreme Court of the state of Minnesota, to which an ap-

peal was taken from the judgment of said District Court, are filed herewith under separate cover.

Petitioner representing that it is aggrieved by a final judgment of the Supreme Court of the state of Minnesota entered in said court on the 13th day of November, 1924, in the aforesaid case; that the matters at issue in said cause are wholly of a federal nature and are of peculiar gravity and importance in that said suit is to recover damages under the Federal Employer's Liability Act of Congress of April 22nd, 1908 (35 Statutes at Large 65) and Acts amendatory thereof, for the death of William Coogan, alleged to have occurred while said William Coogan was in the employ of the petitioner as a brakeman on an interstate freight train.

Petitioner presents this application for writ of certiorari with a conviction of the justice of its position and respectfully prays that its petition be granted to the end that the particular points raised herein may be fully and finally considered and determined.

STATEMENT OF FACTS.

(Figures in parenthesis refer to folios in printed record.)

This action was instituted in the District Court of Dakota county, Minnesota, by the respondent, Edith F. Coogan, as special administratrix of the estate of William Coogan, deceased, to recover damages for the death of William Coogan, who received fatal injuries while employed by petitioner, as a brakeman at Farmington, Minnesota.

On July 14, 1923, about 7:00 A. M., petitioner's freight train No. 92, operating from Farmington to Austin, Minnesota, was being made up by a switching crew on track No. 1 of petitioner's yard at Farmington, Minnesota (ff. 67, 68 and 344). Coogan, the deceased, was rear brakeman of the road crew which was to have charge of the train after it had been made up and when it had started on its journey to Austin. Coogan was killed at about 7 A. M. and before the train had been turned over to the road crew. There was no eye witness to the accident and no one knew in what manner he met his death or what he was then doing. It is conceded by both parties that the train contained interstate cars and that the rights and liabilities of the parties are governed by the Federal Employers' Liability Act.

The tracks in the Farmington yard run east and west. The most northerly track is known as the main line track. South of and parallel to this track there are a large number of yard tracks numbered consecutively 1, 2, 3, etc. In making up train No 92 cars were picked up from the various tracks, pulled onto a so-called lead track at the west end of the yard and kicked down to the east on track No. 1. An iron pipe line three-fourths of an inch in diameter, called an air pipe line, extended parallel to and about one foot south of the south rail of track No. 1 (f. 422). It was fastened at various points to the top of ties by iron clamps or track spikes (ff. 355 and 356).

On the morning in question the first car kicked

east on track No. 1 was the caboose. The decedent rode the caboose on this movement. Thereafter, three cuts of cars were kicked onto track No. 1 from the west end and were coupled onto the caboose by impact (ff. 120 to 123, incl. and 176 to 180, incl.).

Dubke, a member of the switching crew, rode the head car of each one of these cuts and controlled their movements by the hand brakes (ff. 118 to 121, incl., 178 and 179). When the first cut of cars was coupled onto the caboose Dubke conversed with Coogan, who was then standing on the ground beside the caboose (f. 133). This was the last time anyone saw Coogan previous to the finding of his dead body (ff. 132 and 133). After the three cuts of cars had been kicked in on track No. 1, the engine shoved all of the cars one and one-half or two car lengths (ff. 181 and 182). It was the duty of head brakeman Delhanty, of the road crew, to couple up the air on the train (f. 128). After the road engine had been coupled onto the train, Dubke, for the purpose of accommodating Delhanty, started back along the south side of the train and coupled up the air at several different places (ff. 125, 129 and 130). While walking back along the train he discovered Coogan's body lying between tracks No. 1 and No. 2 (f. 130). The body was lying on its back (f. 92) with the head towards the west (f. 95) parallel to track No. 1 and wholly outside the south end of the ties (ff. 51 and 92). The body was located about a car length and a half west of the caboose (ff. 51 and 52). Certain marks on the

ground showed that the body had been dragged about ten feet (f. 54). These marks or scuffing on the ground were located outside of the south rail and extended from the rail out to where the body was found (f. 55). Blood was found on the southeast wheel of the car coupled to the caboose (ff. 56, 57 and 98). The air was not coupled between the caboose and this car. The decedent's hat and other articles were found between the rails under or near the draw bar between the second and third cars ahead of the caboose (ff. 104, 105 and 142). Apparently the wheels had run over decedent's left leg and left arm (ff. 144, 165 and 166). West of the body the air pipe line bulged up from the ties about three inches and bulged in toward the rail from three to six inches (ff. 217, 364, 366 and 474). The bulge in the pipe was about 12 or 15 feet long (ff. 218 and 273). The east end of the bulge was 15 feet west of the hat and other articles mentioned (f. 468) and was from 20 to 50 feet west of the body (ff. 214, 215, 243, 346, 362, 467 and 468).

A witness for the plaintiff testified that a man in coupling up air faces towards the engine. Defendant's witnesses showed that an experienced train man, in going in between cars to couple up the air, invariably has his left foot inside the rail (f. 482) and ordinarily has his right foot outside the rail (ff. 429, 480 and 490). He faces the angle cock (f. 437). Having in mind the train involved in this case a man stepping in between the cars from the left or south side would face towards the

caboose or rear end of the train (ff. 480 and 481). An experienced man would face towards the caboose or rear end of the train when coupling up the air from the left side. However, entering from the north or right side he would face towards the head end of the train. This is brought about by the fact that a man facing the end of any car finds the air hose is to the right of the draw bar and car coupler which in turn are located at the center of the end of the car (ff. 486 and 487).

The plaintiff introduced in evidence decedent's shoes and called attention to the fact that the outside of the counter of the left shoe was scratched and slightly dented in. The plaintiff did not show that this condition existed immediately after the accident or that it did not exist prior to the accident. The undertaker, who was one of plaintiff's witnesses and the only one who testified as to the condition of the shoe in this respect, stated that he noticed the dent and scratch in the shoe quite a while after the accident and that it was first called to his attention by plaintiff's counsel (ff. 146 and 147, 155 and 168). He had no personal recollection of the condition of the shoe when it was taken from decedent's body (f. 157). The shoe had been kept in the undertaker's garage (f. 149). There is no proof to show that the shoe was not scratched and dented during the time it was in the garage.

Mr. Coogan had worked for the defendant for fourteen years prior to the accident (f. 293). Practically every terminal yard on the line of railroad of the defendant, as well as on the line of rail-

way of other railway companies, contains an air pipe line similar to the one involved in the instant case and such air pipe line ordinarily is placed on top of the ties (ff. 417 to 421, incl.). The air pipe line in question was built three or four years prior to Coogan's death (ff. 326, 334 and 424).

He had been working on trains in and out of the Farmington yards since 1908, the year in which the yard was built (f. 335). The plaintiff testified that decedent, her husband, had been working on trains No. 91 and 92 in and out of Farmington practically all the time for a period of from three to four months prior to his death (ff. 303 and 335).

Train No. 91 was due to arrive at Farmington at 3:00 P. M. and train No. 92 was due to leave the same yard at 7:00 A. M. For several months, therefore, previous to July 14th, the date of the accident, when the train arrived at and left the Farmington yard, it would be daylight. Train No. 92 was ordinarily made up on track No. 1, on the main line track, track No. 2 or No. 3. From each of these tracks the air pipe line could be easily seen (ff. 344, 345, 405 and 406).

The air pipe line had been in substantially the same condition for five or six months before the accident (f. 352).

At the close of all the testimony in the case, defendant made a motion for a directed verdict in its favor on the ground that plaintiff had failed to prove any actionable negligence against the defendant, on the ground that any verdict in favor of the

plaintiff would, of necessity, be based wholly upon speculation and conjecture and on the further ground that the evidence conclusively showed that Mr. Coogan, the deceased, assumed the risk caused by the presence and condition of the air pipe line in question.

The motion was denied and the jury brought in a verdict for the plaintiff.

The defendant made a motion for judgment notwithstanding the verdict and this motion was denied.

Judgment was entered in the District Court of Dakota county in favor of the plaintiff on March 10, 1924.

The defendant appealed to the Supreme Court of Minnesota from such judgment and the judgment was affirmed by said Supreme Court on October 31, 1924.

Final judgment was entered in the Supreme Court of the state of Minnesota on November 13th, 1924, in the sum of fourteen thousand three hundred sixty-three and 29/100 ($14,363.29) dollars.

Under the undisputed evidence the judgment in this case has been awarded and affirmed against your petitioner under an erroneous interpretation of the Federal Employers' Liability Act as applied to the facts of this case, in the following particulars:

I.

Error in permitting a recovery herein upon rights asserted under the Federal Employers' Liability

Act, April 22nd, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291.

II.

Error in submitting to the jury the question whether or not under the Federal Employers' Liability Act the defective air pipe line proximately contributed to William Coogan's death for the reason that no evidence in the case will support such a finding or conclusion.

III.

Error in denying defendant's motion for a directed verdict and in permitting the jury, under the Federal Employers' Liability Act to return a verdict in favor of the plaintiff on account of the death of William Coogan for the reason that the cause of William Coogan's death was speculative and conjectural.

IV.

Error in denying defendant's motion for a directed verdict and in permitting the jury to pass upon the question as to whether or not decedent assumed the risk of the defective air pipe line for the reason that William Coogan, as a matter of law, assumed the risk of such defective condition under the Federal Employers' Liability Act.

V.

Error in denying defendant's motion for a directed verdict upon the ground that plaintiff failed

to prove a cause of action or right of recovery in her favor under the Federal Employers' Liability Act or under any other federal act.

VI.

Error in denying defendant's motion for a directed verdict in her favor for the reason that under the Federal Employers' Liability Act William Coogan assumed all risks to himself caused by the alleged improper construction and careless and negligent maintenance of the air pipe line.

VII.

Error in denying defendant's motion for a directed verdict made at the close of all the testimony on the ground that under all the evidence in the case William Coogan's death is speculative and conjectural.

VIII.

Error in denying defendant's motion for judgment notwithstanding the verdict upon the ground that plaintiff failed to prove that the alleged defective air pipe line proximately contributed to William Coogan's death.

IX.

Error in denying defendant's motion for judgment notwithstanding the verdict on the ground that under the Federal Employers' Liability Act, William Coogan assumed the risks to himself

caused by the alleged negligent construction and maintenance of the air pipe line.

THE QUESTIONS INVOLVED.

The plaintiff's theory of the case is that decedent stepped in between the caboose and the car attached to it from the south side of track No. 1, for the purpose of coupling up the air hose between those cars; that he faced towards the engine and had his right foot inside the south rail and his left foot outside the rail; that in making up the train the cars were backed to the east and decedent, in attempting to get out from between the cars caught his left foot under the air pipe line at the point where it was bulged and his foot became fastened; that as a consequence he was caught by the rigging on a moving car, thrown under the wheels and killed. The only claim of negligence is that the air pipe line was defective and that such defective condition was the proximate cause of decedent's death.

The first question, therefore, is whether or not the evidence under the Federal Employers' Liability Act is sufficient to sustain a finding that the alleged defective air pipe line proximately contributed to the death of Mr. Coogan.

The second question is, whether or not the decedent, under the Federal Employers' Liability Act assumed the risk of dangers incident to his working at or about the alleged defective air pipe line.

PRAYER.

In order to correct the error complained of and to the end that the right and liability of petitioner may be determined in accordance with the federal law, your petitioner prays that a writ of certiorari may be issued under the seal of this court, directed to the judges of the Supreme Court of the state of Minnesota and of the District Court of Dakota county, commanding them and each of them to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of the state of Minnesota in the within cause to the end that the judgment of said Supreme Court of the state of Minnesota in said cause may be reviewed by this court as provided by law and that your petitioner may have such other relief as to this court may seem appropriate.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.,
Petitioner.

F. W. ROOT,
A. C. ERDALL,
Attorneys for Petitioner.

STATE OF MINNESOTA,

ss

County of Hennepin.

F. W. Root, being first duly sworn, says that he is one of the attorneys for the petitioner, Chicago, Milwaukee & St. Paul Railway Company; that he has read the foregoing petition; that he has also read the certified copy of the transcript of record under the seal of the Supreme Court of the state of Minnesota in the case of "Edith F. Coogan, as special administratrix of the estate of William Coogan, deceased, respondent, against the Chicago, Milwaukee & St. Paul Railway Company, appellant," and that he is familiar with the same; that he has also read a copy of the opinion of the said Supreme Court in said cause; that the matters of fact stated in said petition conform to said record and opinion and are true to the best of his knowledge, information and belief.

F. W. ROOT,

Subscribed and sworn to before me this 31st day of January, 1925.

A. E. SHARRETTS,

(Seal) Notary Public,

Hennepin County, Minnesota.

My commission expires July 14th, 1928.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Did the Plaintiff Prove That the Alleged Defective Air Pipe Line Proximately Contributed to Decedent's Death so as to Permit a Recovery Under the Federal Employers' Liability Act?

Plaintiff has evolved a theory as to how the accident occurred. Such theory is based upon a series of presumptions and not upon facts proven in this case.

The plaintiff has an accident causing death and a theory as to the way in which the accident occurred but such theory is unsupported by the testimony.

In *Perkins v. N. P. Ry. Co.*, 193 Fed. 219, at page 225 the court points out that this is not a sufficient basis on which to create a liability.

The leading case on this matter is *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 45 L. Ed. 261, 21 Sup. Ct. Rep. 275. We, therefore, take the liberty of quoting rather extensively from that decision. On page 277 of the opinion the court said:

> "Upon these facts we make these observations: First, that while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against

him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *New Jersey R. & Transp. Co. v. Pollars*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859) a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

See also:

Pittsburgh Coal Co v. Myers, 203 Fed. 221.

Smith v. Illinois Cent. R. Co., 200 Fed. 553.

Traux v. M. St. P. & S. S. M. Ry. Co., 89 Minn. 143.
Bruckman v. C. St. P. M. & O. Ry. Co., 110 Minn. 309.
Perkins v. G. N. Ry. Co., 152 Minn. 226.

In *United States v. Ross*, 92 U. S. 281, 23 Sup. Ct. Rep. 707, it is stated on page 108:

> "No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

The court on the same page states as follows:

> "A presumption which the jury is to make is not a circumstance in proof; it is not, therefore, a legitimate foundation for a presumption."

In the case of *Marian J. Looney, Admx., etc. v. Metropolitan Railroad Company*, 200 U. S. 480, 26 Sup. Ct. 303, the United States Supreme Court on page 306 lays down the following rule with reference to a presumption of negligence on the part of the employer in a case in which an employee is killed:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

See also

Freese v. C., B. & Q. Ry. Co., decided by the United States Supreme Court on October 15, 1923, and reported in 144 Sup. Ct. Rep. 1.

The plaintiff claims decedent stepped in between the caboose and the car attached to it, to couple up the air.

After the accident the air was not coupled between these cars and there was blood on the southeast wheel of the car ahead of the caboose.

Decedent may or may not have stepped in between the caboose and the car next to it. He may have started to get onto the west end of the caboose just at the time when cars were kicked into the caboose and on account of the impact been knocked off and fallen on the track between the caboose and the car next to it.

He may have started to go in between the cars and tripped on the rail, on the end of the tie or on the air pipe line at a point where it was not bulged. He may have been in between the cars and stumbled over the rail in getting out. He may have been between the cars and when he heard them backing up, have grabbed for a hand hold, missed it and fallen. He may have been on top of the cars to release the brakes and fallen between the caboose and the car next to it. No one saw the plaintiff step in between the cars and it is a presumption only that he did so.

It was the duty of the head brakeman of the road crew to couple up the air and not decedent's duty and therefore, it seems that a presumption that he stepped in between the cars to couple up the air would be unsupported by the evidence in this case.

It is plaintiff's theory that decedent had his right

foot inside the rail and his left foot outside the rail. Decedent's left leg and left arm were crushed and apparently run over. Under these circumstances the natural inference is that the left foot was inside the rail and the right foot outside. If the left foot was inside the rail it was not caught under the air pipe line outside the rail. Here again a presumption is indulged in without support in the evidence and in this instance the presumption is not consistent with the evidence in the case.

It is plaintiff's theory that decedent's left foot was caught and fastened under the air pipe line at the point where the pipe was bulged. In support of this theory she introduced in evidence decedent's left shoe which contained a slight indentation and scratch on the outside counter. No one noticed this condition of the shoe until a considerable time after the accident and the funeral. Before the dent and scratch was noticed on the shoe the decedent's shoes had been in the undertaker's garage for some time and no particular attention had been given to them. Here, of course, the plaintiff indulges in the presumption that the shoe had no dent or scratch on it before the accident and that the shoe was scratched and dented in the accident. There is no proof to show what the condition of the shoe was before the accident, what the condition of the shoe was immediately after the accident or what its condition was at the time it was taken off the body by the undertaker. If the left shoe had been fastened under the air pipe line the shoe would naturally be scratched on both the inside and out-

side of the foot. If the decedent's left leg was run over it is only natural to expect that the shoe would be dragged on the ground, or hit a rock, a tie, a bolt or a part of the car and as a consequence become dented and scratched. Surely a dent and scratch on one side of the shoe would not prove that the shoe was fastened under the air pipe line. There was absolutely no proof of any scuffing or other marks on the ties or the ground under the air pipe line or any evidence to indicate that anything had been caught under the air pipe line. The iron pipe was old and of course rusty, but no proof was introduced indicating that the rust was scraped off at any place. There was no proof of any marks on or under the pipe at any place. The proof was undisputed that the pipe had been in substantially the same condition for five or six months before the accident and plaintiff has not and cannot, claim that the pipe was bulged on account of the accident. The body was from 20 to 50 feet east of the east end of the bulge in the pipe. Decedent's hat and other articles were found 15 or more feet east of the east end of the bulge in the pipe. The scuffing and marks on the ground were found east of the hat and other articles mentioned. There is, therefore, no proof to indicate that decedent was in the immediate vicinity of the bulge in the air pipe line. There is no evidence in the case which supports a presumption that the decedent's left foot was fastened under the air pipe line at the point where the pipe was bulged.

As stated in the Patton case, *supra*, it is not suf-

ficient for the plaintiff to show that the defendant may have been guilty of negligence but the evidence must point to the fact that defendant was. As stated in the Looney case, *supra*, a right of recovery cannot be based upon a series of presumptions.

Without any support in the evidence the plaintiff indulges in the following presumptions:

1. That decedent stepped in between the caboose and car attached to it to couple up the air hose.

2. That decedent had his right foot between the rails and his left foot between the south rail and the air pipe line.

3. That the cars were moved before decedent had a chance to couple up the air hose.

4. That decedent endeavored to get out from between the cars.

5. That decedent at that time was at the place where the air pipe was bulged.

6. That decedent's left foot became fastened under the round air pipe line.

7. That the shoe was not dented or scratched before the accident.

8. That the left shoe was scratched and indented immediately after the accident.

9. That the left shoe did not become scratched or indented while on the floor of the undertaker's garage.

10. That the dent and scratch on the left shoe was caused by the foot being caught under the air pipe line.

11. That on account of decedent's left foot being caught under the air pipe line he was caught by the rigging of the car and was thrown under the wheels and killed.

The difficulty with plaintiff's theory in this case is that she has failed to prove facts from which the ultimate inferences which she wishes to establish can be drawn. She has merely suggested a series of presumptions many of which are not even consistent with facts proved in the case.

The weakness in plaintiff's case is that she has no facts to show that decedent stepped in between the cars. She has no evidence to show that he attempted to come out from between the cars. She has no evidence to show that his left foot ever became fastened under the air pipe line at the point where the air pipe line was bulged or at any other point and she has no evidence to show that at any time he was any nearer than 15 feet from the nearest end of the bulge in the pipe.

It is respectfully suggested that plaintiff has failed to prove that the alleged defective air pipe line proximately contributed to William Coogan's death.

DECEDENT ASSUMED THE RISK CAUSED BY THE CONDITION OF THE AIR PIPE LINE AND CANNOT RECOVER IN THIS CASE.

The evidence is undisputed that decedent worked on trains running into and from the Farmington yards for a period of three or four months next preceding the accident and during that time his train left and arrived during daylight and he had considerable occasion to be on and near track No. 1. He had a great many opportunities to observe the condition of the air pipe line. He had had considerable experience on trains running in and out of the Farmington yards prior to the period just above mentioned. The air pipe line had been in substantially the same condition for a period of at least five or six months before the accident and he is of course presumed to have known of its location and condition.

If he went in between the caboose and car next to the caboose as plaintiff claims he went in with a knowledge of the condition of the air pipe line in question, he, of course, fully appreciated the dangers and risk of his working between the cars in the vicinity of the air pipe line and he must have appreciated the dangers to be reasonably anticipated in working at and about such air pipe line at the point where it was bulged.

Special attention is called to the case of *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 41 Sup. Ct. Rep. 162. In the Berkshire case the United States Supreme Court holds that an engineer who has

passed over a particular route many times must be presumed to know of the existence of a mail crane when such mail crane was visible from the engineer's seat. This case we consider of special importance on this feature of the case and we therefore take the liberty of quoting rather extensively from it. On page 162, the court said:

> "The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers."

On page 163, the court stated as follows:

> "Linder has been upon this route for some years, has passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat, half a mile ahead through a front window. About a mile before reaching Carney, Linder had noticed that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indi-

cate that he was more than fourteen inches out from the engine's side."

On page 163, the court further said:

"It is going very far to leave it open to a jury to attach liability *in tort* to a system by which the end of the arms of postal cranes come to fourteen inches from the car.

(3) But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

See also:

Tuttle, Admx. v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30 L. Ed. 1114.

Little Rock & M. R. Co. v. Moseley, 56 Fed. 1009.

The air pipe line in question constituted a part of the equipment of the Farmington yard. If Linder in the Berkshire case was presumed to have known of the mail crane and to have known the danger to be expected therefrom, it seems clear that Coogan must be presumed to have known of the air pipe line and its condition and to have known the dangers to be expected therefrom by a

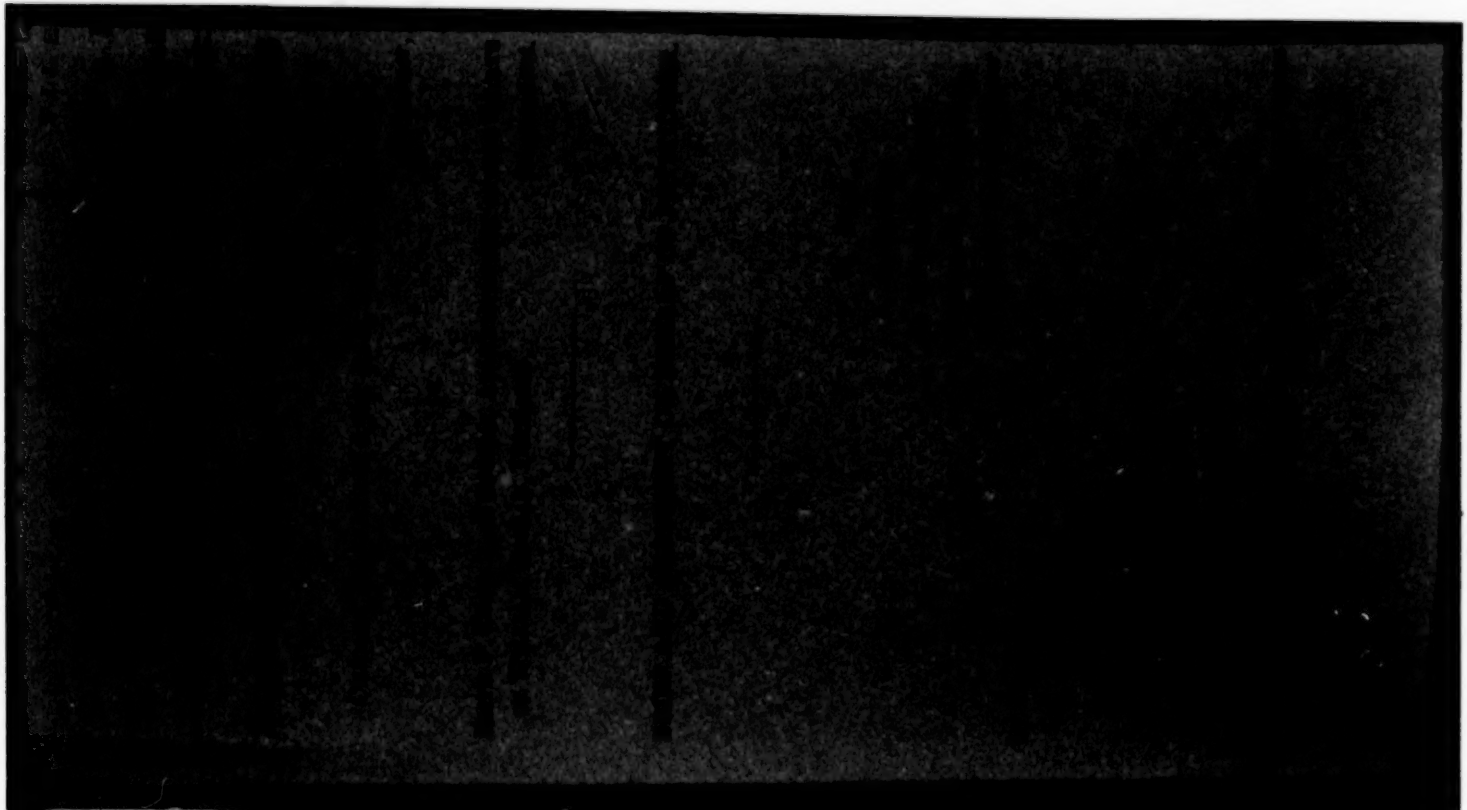
brakeman coupling up the air on track No. 1 from the south side of the train while cars were being kicked into and against said train. He, of course, knew that he might be required to get out from between the cars very rapidly and that any obstruction might be fatal. Of course, it should be kept in mind that it was the duty of the head brakeman to couple up the air and not the duty of decedent.

We submit that the reasoning of the United States Supreme Court in the Berkshire case is applicable and controlling in the present case on the question of assumption of risk and that it appears as a matter of law that Coogan assumed the risk of the method of construction and condition of the air pipe line in question and that such assumption of risk under the Federal Employers' Liability Act prevents a recovery on behalf of the plaintiff in this case.

It is, of course, regrettable that no one knows the manner in which Mr. Coogan met his death and it is indeed unfortunate that the plaintiff is not in a position to show the manner in which her husband met his death in order that the court may be in a position to decide whether or not the defendant company was or was not responsible for such death.

However, as indicated in the Patton and other cases mentioned above, juries should not be permitted to substitute sympathy for evidence in arriving at verdicts.

The manner in which Coogan met his death and the proximate cause thereof is purely speculative and conjectural and the plaintiff has failed to



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Supreme Court of the United States

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

(Opinion of the Supreme Court of Minnesota is reported in 200 Northwestern Reporter 477.)

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED.

May it please the Court:

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Minnesota entered, docketed and filed on November 13, 1924, in favor of the plaintiff and against the defendant in the sum of $14,363.29 (R. 108 and 109).

William Coogan, one of defendant's brakemen, was run-over and killed at Farmington, Minnesota. Edith Coogan, as administratrix of Coogan's estate, claims she is entitled to recover damages for the death of Coogan under rights and liabilities created by the so-called Federal Employer's

Liability Act, Employer's Liability Act of 1908, Chapter 149, 35 Stat. 65, as amended April 5, 1910, Chapter 143, 36 Stat. 291.

Plaintiff predicated her cause of action solely on the Federal Employer's Liability Act, namely, Coogan's foot, while he was engaged in and about an interstate train, was caught under and held by a defective air pipe and while so held he was run over and killed (R. 2, 3 and 8).

At the close of the testimony defendant duly and properly in accordance with the practice of the State Court, moved the Court to direct a verdict in its favor on the ground that no actionable negligence had been shown and a verdict in this case in favor of plaintiff would necessarily be based upon speculation and conjecture and on the ground that Coogan assumed the risk (R. 93). The motion was denied (R. 93) and a verdict rendered for plaintiff (R. 97).

Defendant, in accordance with the practice of the State Court, duly moved the Court for judgment notwithstanding the verdict (R. 98 and 99). The motion was denied (R. 99). Judgment was entered in favor of the plaintiff in the District Court of Dakota County on March 10, 1924 (R. 100 and 101).

Defendant duly appealed from the judgment to the Supreme Court of Minnesota, the highest Court of the State, and set out as error the ruling of the trial court in denying aforesaid motions and in permitting plaintiff to recover upon rights asserted under the Federal Employer's Liability Act, *supra* (R. 101 to 103, incl.). The Supreme Court of Minnesota affirmed the orders of the trial court, denying defendant's motion for judgment notwithstanding the verdict and the order of the trial court entering judgment for the plaintiff. The Supreme Court of Minnesota held there was

substantial evidence which justified the jury in finding that defendant was liable under the Federal Employer's Liability Act because of the alleged defective air pipe line and further held that Coogan did not, as a matter of law under the Federal Employer's Liability Act, assume the risk of injury to himself on account of the condition of the air pipe line (R. 104).

This action, therefore, is brought to establish a liability depending solely on Acts of Congress.

Employer's Liability Acts, supra.

Mondou v. N. Y. N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. Rep. 169.

Seaboard Air Line Railway Company v. Horton, 233 U. S. 492, 34 Sup. Ct. Rep. 635.

It involves rights that exist exclusively under Federal Statutes and it therefore presents federal questions properly determinable by this Court and the following cases sustain the jurisdiction of this Court.

St. Louis Iron Mountain & Southern Ry. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct. Rep. 858.

New Orleans & N. E. Ry. Co., et al. v. Harris, 247 U. S. 367, 38 Sup. Ct. Rep. 535.

Southern Railway Company v. Gray, Admx., 241 U. S. 333, 36 Sup. Ct. Rep. 558.

N. Y. Central Railway Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. Rep. 546.

Yazoo & M. V. Railway Company, et al. v. Mullins, 249 U. S. 531, 39 Sup. Ct. Rep. 368.

STATEMENT OF THE CASE.

This action was instituted in the District Court of Dakota County, Minnesota, by the respondent, Edith F. Coogan, as special administratrix of the estate of William Coogan, deceased, to recover damages for the death of William Coogan, who received fatal injuries while employed by petitioner as a brakeman at Farmington, Minnesota.

On July 14, 1923, about 7:00 A. M., petitioner's freight train No. 92, operating from Farmington to Austin, Minnesota, was being made up by a switching crew on track No. 1, of petitioner's yard at Farmington, Minnesota (R. 12, 13 and 64). Coogan, the deceased, was rear brakeman of the road crew which was to have charge of the train after it had been made up and when it had started on its journey to Austin. Coogan was killed at about 7:00 A. M. and before the train had been turned over to the road crew. There was no eye witness to the accident and no one knew in what manner he met his death or what he was then doing.

It is conceded by both parties that the train contained interstate cars and that the rights and liabilities of the parties are governed by the Federal Employer's Liability Act.

The tracks in the Farmington yard run east and west. The most northerly track is known as the main line track. South of and parallel to this track there are a large number of yard tracks numbered consecutively 1, 2, 3, etc. (R. 33 and 63). In making up train No. 92 cars were picked up from the various tracks, pulled onto a so-called lead track at the west end of the yard and kicked down to the east on track No. 1. An iron pipe line one and three-fourths inches in diameter (R. 78) called an air pipe line, extended parallel to and about one foot south of the south rail of track No. 1

(R. 39 and 78). It was fastened at various points to the top of ties by iron clamps or track spikes (R. 66).

On the morning in question the first car kicked east on track No. 1 was the caboose (R. 13, 22 and 33). The decedent rode the caboose on this movement (R. 13 and 33). Thereafter three cuts of cars were kicked onto track No. 1 from the west end and were coupled onto the caboose by impact (R. 22, 23, 33 and 34).

Dubke, a member of the switching crew, rode the head car of each one of these cuts and controlled their movements by the hand brakes (R. 22, 23, 33 and 34). When the first cut of cars was coupled onto the caboose Dubke conversed with Coogan, who was then standing on the ground beside the caboose (R. 25). This was the last time anyone saw Coogan previous to the finding of his dead body (R. 25). After the three cuts of cars had been kicked in on track No. 1, the engine shoved all of the cars one and one-half or two car lengths (R. 34). It was the duty of head brakeman Delhanty, of the road crew, to couple up the air on the train (R. 24). After the road engine had been coupled onto the train, Dubke, for the purpose of accommodating Delhanty, started back along the south side of the train and coupled up the air at several different places (R. 23 and 24). While walking back along the train he discovered Coogan's body lying between tracks No. 1 and No. 2 (R. 23). The body was lying on its back (R. 17) with the head towards the west (R. 18) parallel to track No. 1 and wholly outside the south end of the ties (R. 10 and 17). The body was located about a car length and a half west of the caboose (R. 10 and 18). Certain marks on the ground showed that the body had been dragged eight or ten feet (R. 10, 11 and 18). These marks or scuffing on the ground were located

outside of the south rail and extended from the rail out to where the body was found (R. 10). Blood was found on the southeast wheel of the car coupled to the caboose (R. 11 and 18). The air was not coupled between the caboose and this car. The decedent's hat and other articles were found between the rails under or near the draw bar between the second and third cars ahead of the caboose (R. 20, 26 and 27). Apparently the wheels had run over decedent's left leg and left arm (R. 27). West of the body the air pipe line bulged up from the ties about three inches and bulged in toward the rail from three to six inches (R. 40, 41, 68, 69, 87 and 88). The bulge in the pipe was about 12 or 15 feet long (R. 41 and 69). The east end of the bulge was 15 feet west of the hat and other articles mentioned (R. 86) and was from 20 to 50 feet west of the body (R. 40, 47, 64, 67 and 86).

A witness for the plaintiff testified that a man in coupling up air faces towards the engine (R. 41). Defendant's witnesses showed that an experienced train man, in going in between cars to couple up the air, invariably has his left foot inside the rail (R. 88, 90 and 91) and ordinarily has his right foot outside the rail (R. 79, 80, 81, 88, 90 and 91). He faces the angle cock (R. 81). Having in mind the train involved in this case a man stepping in between the cars from the left or south side would face towards the caboose or rear end of the train (R. 64, 65 and 89). An experienced man would face towards the caboose or rear end of the train when coupling up the air from the left side. However, entering from the north or right side he would face towards the head end of the train (R. 65 and 89). This is brought about by the fact that a man facing the end of any car finds the draw bar and car coupler are located at the center of the

end of the car and the air hose is to the right of the coupler and draw bar (R. 90 and 91).

The plaintiff introduced in evidence decedent's shoes and called attention to the fact that the outside of the counter of the left shoe was scratched and slightly dented in. The plaintiff did not show that this condition existed immediately after the accident or that it did not exist prior to the accident. The undertaker, who was one of plaintiff's witnesses and the only one who testified as to the condition of the shoe in this respect, stated that he noticed the dent and scratch in the shoe quite a while after the accident and that it was first called to his attention by plaintiff's counsel (R. 27 and 29). He had no personal recollection of the condition of the shoe when it was taken from decedent's body (R. 29 and 30). H. J. Goodwin, one of plaintiff's counsel, testified that he first saw the shoe a week or ten days after the accident (R. 53). The undertaker said it was quite a while after the body was shipped to Austin for the funeral (R. 27). The shoe had been kept in the undertaker's garage and no attention was paid to it (R. 27 to 30, incl.). There is no proof to show that the shoe was not scratched and dented during the time it was in the garage.

Coogan had worked for the defendant for fourteen years prior to the accident (R. 55). Practically every terminal yard on the line of railroad of the defendant, as well as on the line of railway of other railway companies, contains an air pipe line similar to the one involved in the instant case and such air pipe line ordinarily is placed outside the rails and on the top of the ties (R. 77 and 78). The air pipe line in question was built three or four years prior to Coogan's death (R. 61, 62 and 78). He had been working on trains in and out of the Farmington yards since 1908, the year in

which the yard was built (R. 62). The plaintiff testified that decedent, her husband, had been working on trains No. 91 and 92 in and out of Farmington practically all the time for a period of from three to four months prior to his death (R. 56 and 62).

Train No. 91 ordinarily arrived at Farmington at about 3:00 P. M. (R. 63) and train No. 92 was due to leave the same yard at 7:00 A. M. (R. 64). For several months, therefore, previous to July 14th, the date of the accident, when the train arrived at and left the Farmington yard, it would be daylight. Train No. 92 was ordinarily made up on track No. 1, on the main line track, track No. 2 or No. 3. From each of these tracks the air pipe line could be easily seen (R. 64 and 75).

The air pipe line had been in substantially the same condition for five or six months before the accident (R. 65).

At the close of all the testimony in the case, defendant made a motion for a directed verdict in its favor on the ground that plaintiff had failed to prove any actionable negligence against the defendant, on the ground that any verdict in favor of the plaintiff would, of necessity, be based wholly upon speculation and conjecture and on the further ground that the evidence conclusively showed that Mr. Coogan, the deceased, assumed the risk caused by the presence and condition of the air pipe line in question (R. 93).

The motion was denied and the jury brought in a verdict for the plaintiff (R. 93 and 97).

The defendant made a motion for judgment notwithstanding the verdict and this motion was denied (R. 99).

Judgment was entered in the District Court of Dakota County in favor of the plaintiff on March 10, 1924 (R. 99 to 101, incl.).

The defendant appealed to the Supreme Court of Minnesota from such judgment and the judgment was affirmed by said Supreme Court on October 31, 1924 (R. 104 and 105) (200 N. W. Rep. 477).

Final judgment was entered in the Supreme Court of the state of Minnesota on November 13th, 1924, in the sum of fourteen thousand three hundred sixty-three and 29/100 ($14,363.29) dollars (R. 108 and 109).

A petition for a writ of certiorari was granted by this Court on March 16, 1925.

The Questions Involved.

The plaintiff's theory of the case is that decedent stepped in between the caboose and the car attached to it from the south side of track No. 1, for the purpose of coupling up the air hose between those cars; that he faced towards the engine and had his right foot inside the south rail and his left foot outside the rail; that in making up the train the cars were backed to the east and decedent, in attempting to get out from between the cars caught his left foot under the air pipe line at the point where it was bulged and his foot became fastened; that as a consequence he was caught by the rigging on a moving car, thrown under the wheels and killed. The plaintiff's cause of action is predicated solely on the Federal Employer's Liability Act. The only claim of negligence is that the air pipe line was defective and that such defective condition was the proximate cause of decedent's death.

The first question, therefore, is whether or not the evidence under the Federal Employer's Liability Act is sufficient to sustain a finding that the alleged defective air pipe line proximately contributed to the death of Coogan.

The second question is, whether or not the decedent, under

the Federal Employer's Liability Act assumed the risk of dangers incident to his working at or about the alleged defective air pipe line.

Said questions are raised by motion for directed verdict made at the close of the testimony (R. 93), by motion for judgment notwithstanding the verdict (R. 98 and 99) and by assignments of error in the appeal to the Supreme Court of Minnesota (R. 101 and 102).

Specifications of Error Relied Upon.

I.

The Supreme Court of Minnesota erred in permitting a recovery herein upon rights asserted under the Federal Employer's Liability Act, April 22nd, 1908, Chapter 149, 35 Stat. 65, as amended April 5, 1910, Chapter 143, 36 Stat. 291.

II.

The Supreme Court of Minnesota erred in submitting to the jury the question whether or not under the Federal Employer's Liability Act the defective air pipe line proximately contributed to William Coogan's death for the reason that no evidence in the case will support such a finding or conclusion.

III.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict and in permitting the jury, under the Federal Employer's Liability Act to return a verdict in favor of the plaintiff on account of the death of William Coogan for the reason that the cause of William Coogan's death was speculative and conjectural.

IV.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict and in permitting the jury to pass upon the question as to whether or not decedent assumed the risk of the defective air pipe line for the reason that William Coogan, as a matter of law, assumed the risk of such defective condition under the Federal Employer's Liability Act.

V.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict upon the ground that plaintiff failed to prove a cause of action or right of recovery in her favor under the Federal Employer's Liability Act or under any other federal act.

VI.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict in her favor for the reason that under the Federal Employer's Liability Act William Coogan assumed all risks to himself caused by the alleged improper construction and careless and negligent maintenance of the air pipe line.

VII.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict made at the close of all the testimony on the ground that under all the evidence in the case William Coogan's death is speculative and conjectural.

VIII.

The Supreme Court of Minnesota erred in denying defendant's motion for judgment notwithstanding the verdict upon the ground that plaintiff failed to prove that the alleged defective air pipe line proximately contributed to William Coogan's death.

IX.

The Supreme Court erred in denying defendant's motion for judgment notwithstanding the verdict on the ground that under the Federal Employer's Liability Act William Coogan assumed the risks to himself caused by the alleged negligent construction and maintenance of the air pipe line.

BRIEF OF THE ARGUMENT.

On July 14, 1923, at about 7:00 A. M., defendant's freight train No. 92 was being made up by a switching crew on track No. 1 at defendant's yard at Farmington, Minnesota. Coogan was rear brakeman of the road crew which was to have charge of the train after it was made up and ready to start on the trip to Austin. The train contained cars billed to points outside the State of Minnesota. He was killed before the train had been turned over to the road crew. There was no eye witness to the accident. Plaintiff predicates her cause of action on the Federal Employer's Liability Act. The sole act of negligence alleged is that defendant was negligent in the maintenance of a so-called air pipe line in that the pipe which normally lay on top of the ties, one foot outside the rails, on the south side, at the time in question bulged up from the ties about three inches and was also bent in towards the rail several inches.

Plaintiff claims Coogan was in the act of coupling up the air between the caboose and the car attached to it; that he was facing the engine with his left foot outside the rail between the air pipe line and the rail and had his right foot between the rails; that the cars were moved back towards the west and in getting out from between the cars his left foot was caught and fastened under the air pipe line at the point where it was bulged and plaintiff's clothing was caught by the rigging on the car and he was thrown under the wheels and killed. All movements of the cars were from the east to the west. Plaintiff introduced no evidence indicating that Coogan was nearer than a point fifteen feet west of the east end of the bulge in the pipe line. She introduced in evidence Coogan's left shoe. This shoe had a dent or scratch on the outside counter and she took the position that this proved that the left foot had been caught under the air pipe line in question. Plaintiff claims the alleged defective air pipe line was the proximate cause of Coogan's death and that she is entitled to recover under the Federal Employer's Liability Act on account of the aforesaid negligence.

Defendant contends that the plaintiff failed to prove a cause of action under the Federal Employer's Liability Act as the cause of Coogan's death is speculative and conjectural and the evidence in the case not only does not support plaintiff's theory of the case but in fact is inconsistent therewith. Defendant also contends that decedent must have known of the condition of the air pipe line and as a matter of law, under the Federal Employer's Liability Act, assumed the risk incident to working at and about such air pipe line in its then existing condition.

The merit of Specifications of Error Nos. I, II, III, V,

VII and VIII all depend upon the answer to the question as to whether or not plaintiff's right of recovery is based upon speculation and conjecture as claimed by defendant, or is based upon competent and substantial evidence which the jury could properly find proved that the alleged defective air pipe line proximately contributed to Coogan's death so as to permit a recovery under the so-called Federal Employer's Liability Act as claimed by plaintiff.

The merit of Specifications of Error Nos. IV, VI and IX deal with and depend upon a decision of the question as to whether or not Coogan assumed the risk caused by the condition of the air pipe line. Under these circumstances it would seem unnecessary and improper to take up the time of the Court to discuss each of the individual specifications of error as the ultimate error to which they respectively relate are covered under the two general subdivisions hereinafter discussed.

Plaintiff Failed to Prove That the Alleged Defective Air Pipe Line Proximately Contributed to Decedent's Death so as to Permit a Recovery Under the Federal Employer's Liability Act.

Plaintiff has evolved a theory as to how the accident occurred. Such theory is based upon a series of presumptions and not upon facts proven in this case.

The plaintiff has an accident causing death and a theory as to the way in which the accident occurred but such theory is unsupported by the testimony.

In *Perkins v. Northern Pacific Ry. Co.*, 193 Fed. 219, at page 225, the Court points out that this is not a sufficient basis on which to create a liability.

The leading case on this matter is *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 45 L. Ed. 261, 21 Sup. Ct. Rep. 275. We, therefore, take the liberty of quoting rather extensively from that decision. On page 663 of the opinion, the Court said:

> "Upon these facts we make these observations: First, that while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *New Jersey R. Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there

is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this connection we wish to call the Court's special attention to a recent well reasoned decision of the Circuit Court of Appeals, Third Circuit, to-wit: *Reading Co. v. Boyer*, 6 Fed. (2d), 185.

See also:

Pittsburgh Coal Co. v. Myers, 203 Fed. 221.
Smith v. Illinois Cent. R. Co., 200 Fed. 553.
Truax v. M., St. P. & S. S. M. Ry. Co., 89 Minn. 143.
Bruckman v. C., St. P., M. & O. Ry. Co., 110 Minn. 309.
Perkins v G. N. Ry. Co., 152 Minn. 226.

In *United States v. Ross*, 92 U. S. 707, 23 Sup. Ct. 281, it is stated on page 283:

"No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proven, and not themselves presumed."

The Court on page 284, states as follows:

"A presumption which the jury is to make is not a circumstance in proof; it is not, therefore, a legitimate foundation for a presumption."

In the case of *Marian J. Looney, Admx., etc., v. Metropolitan Railroad Company*, 200 U. S. 480, 26 Sup. Ct. 303,

the United States Supreme Court on page 488 lays down the following rule with reference to a presumption of negligence on the part of the employer in a case in which an employee is killed:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

See also:

Freese v. C., B. & Q. Ry. Co., 263 U. S. 1, 44 Sup. Ct. Rep. 1.

The plaintiff claims decedent stepped in between the caboose and the car attached to it, to couple up the air.

After the accident the air was not coupled between these cars and there was blood on the southeast wheel of the car ahead of the caboose (R. 11 and 18).

Decedent may or may not have stepped in between the caboose and the car next to it. He may have started to get onto the west end of the caboose just at the time when cars were kicked into the caboose and on account of the impact been knocked off and fallen on the track between the caboose and the car next to it.

He may have started to go in between the cars and tripped on the rail, on the end of the tie or on the air pipe line at a point where it was not bulged. He may have been in between the cars and stumbled over the rail in getting out. He may have been between the cars and when he heard them backing up, have grabbed for a hand hold, missed it and fallen. He may have been on top of the cars to release the

brakes and fallen between the caboose and the car next to it. No one saw the plaintiff step in between the cars and it is a presumption only that he did so.

It was the duty of the head brakeman of the road crew to couple up the air (R. 24) and not decedent's duty and therefore, it seems that a presumption that he stepped in between the cars to couple up the air would be unsupported by the evidence in this case.

It is plaintiff's theory that decedent had his right foot inside the rail and his left foot outside the rail. Decedent's left leg and left arm were crushed and apparently run over (R. 27). Under these circumstances the natural inference is that the left foot was inside the rail and the right foot outside. If the left foot was inside the rail it was not caught under the air pipe line outside the rail. Here again a presumption is indulged in without support in the evidence and in this instance the presumption is not consistent with the evidence in the case.

It is plaintiff's theory that decedent's left foot was caught and fastened under the air pipe line at the point where the pipe was bulged. The only evidence introduced by plaintiff in support of her theory was decedent's left shoe which contained a slight indentation and scratch on the outside counter. No one noticed this condition of the shoe until a considerable time after the accident and the funeral (R. 27 and 29). Before the dent and scratch was noticed on the shoe the decedent's shoes had been in the undertaker's garage for some time and no particular attention had been given to them (R. 27 to 30, incl.). Here, of course, the plaintiff indulges in the presumption that the shoe had no dent or scratch on it before the accident and that the shoe was scratched and dented in the accident. There is no proof to

show what the condition of the shoe was before the accident, what the condition of the shoe was immediately after the accident or what its condition was at the time it was taken off the body by the undertaker (R. 27 to 30, incl.). If the left shoe had been fastened under the air pipe line the shoe would naturally be scratched on both the inside and outside of the foot. If the decedent's left leg was run over it is only natural to expect that the shoe would be dragged on the ground, or hit a rock, a tie, a bolt or a part of the car and as a consequence become dented and scratched. Surely a dent and scratch on one side of the shoe would not prove that the shoe was fastened under the air pipe line. There was absolutely no proof of any scuffing or other marks on the ties or the ground under the air pipe line or any evidence to indicate that anything had been caught under the air pipe line. The iron pipe was old and, of course, rusty, but no proof was introduced indicating that the rust was scraped off at any place. There was no proof of any marks on or under the pipe at any place. The proof was undisputed that the pipe had been in substantially the same condition for five or six months before the accident (R. 65) and plaintiff has not and cannot, claim that the pipe was bulged on account of the accident. The body was from 20 to 50 feet east of the east end of the bulge in the pipe (R. 40, 47, 64, 67 and 86). Decedent's hat and other articles were found 15 or more feet east of the east end of the bulge in the pipe (R. 86). The scuffing and marks on the ground from the body were found extending from the body to a point eight to ten feet west thereof (R. 10, 11 and 18). The scuffing, therefore, was east of the hat and other articles mentioned. There is, therefore, no proof to indicate that decedent was at any time nearer than 15 feet of the bulge in the air pipe

line. There is no evidence in the case which supports a presumption that the decedent's left foot was fastened under the air pipe line at the point where the pipe was bulged.

As stated in the Patton case, *supra*, it is not sufficient for the plaintiff to show that the defendant may have been guilty of negligence but the evidence must point to the fact that defendant was. As stated in the Looney case, *supra*, a right of recovery cannot be based upon a series of presumptions.

Without any support in the evidence the plaintiff indulges in the following presumptions:

1. That decedent stepped in between the caboose and car attached to it to couple up the air hose.

2. That decedent had his right foot between the rails and his left foot between the south rail and the air pipe line.

3. That the cars were moved before decedent had a chance to couple up the air hose.

4. That decedent endeavored to get out from between the cars.

5. That decedent at that time was at the place where the air pipe was bulged.

6. That decedent's left foot became fastened under the round air pipe line.

7. That the shoe was not dented or scratched before the accident.

8. That the left shoe was scratched and indented immediately after the accident.

9. That the left shoe did not become scratched or indented while on the floor of the undertaker's garage.

10. That the dent and scratch on the left shoe was caused by the foot being caught under the air pipe line.

11. That on account of decedent's left foot being caught under the air pipe line he was caught by the rigging of the car and was thrown under the wheels and killed.

In the present case the plaintiff introduced evidence as to the condition of the air pipe line and the sole negligence complained of was the condition of same. In *Perkins v. Northern Pacific Railway Company, supra*, at page 223, the Circuit Court, Eastern Division of Washington, states:

> "In cases of this character it is incumbent upon the plaintiff to show not only negligence on the part of the master but causal connection between that negligence and the injury complained of."

The plaintiff here has wholly failed to show any causal connection between the alleged defective air pipe line and the death of her husband.

In *Smith v. Illinois Central Railway Company, et al., supra,* the Circuit Court of Appeals of the Sixth Circuit, stated as follows:

> "It is not enough for plaintiff to show that defendant may have been guilty of negligence. The evidence must point to the fact that it was so negligent. And where the testimony leaves the question unanswered, and shows that any one of several things may have induced the accident. For one or more of which the defendant is responsible, and for others of which he is not, it is not permissible to speculate between the several causes and to find that the negligence of defendant was the real cause, in the absence of satisfactory foundation in the testimony for that conclusion."

In various cases the rule has been stated that cases should not be submitted to the jury for submission simply on a question of probability. In *Day v. Boston & Maine Railroad Co.*, 96 Me. 207, 52 Atlantic Reporter 771, at page 217, Judge Emery stated:

> "Quantitative probability is only the greater chance. It is not proof, nor even probative evidence of the proposition to be proven. That in one throw of dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise. * * * However confidently one in his own affairs may base his judgment on more probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances."

See also:

Virginia & S. W. Ry. Co. v. Hawk, 160 Federal 348.

There, of course, is a possibility that Coogan was killed in the manner in which plaintiff claims but the evidence not only does not support plaintiff's theory but is so inconsistent with the known facts as to make it highly improbable.

The difficulty with plaintiff's theory in this case is that she has failed to prove facts from which the ultimate inferences which she wishes to establish can be drawn. She has merely suggested a series of presumptions many of which are not even consistent with facts proven in the case.

Plaintiff's entire case is based on an alleged defective air pipe line under which she claims Coogan's foot became fastened. Plaintiff has no evidence to show that Coogan's left foot ever became fastened under the air pipe line at the point where the air pipe line was bulged or at any other point and she has no evidence to show that at any time he was any nearer than 15 feet from the nearest end of the bulge in the pipe.

It is respectfully suggested that plaintiff has failed to prove that the alleged defective air pipe line proximately contributed to Coogan's death.

DECEDENT ASSUMED THE RISK CAUSED BY THE CONDITION OF THE AIR PIPE LINE AND CANNOT RECOVER IN THIS CASE.

The evidence is undisputed that Coogan worked on trains running into and from the Farmington yards for a period of three or four months next preceding the accident (R. 56 and 62) and during that time his train left and arrived during daylight and he had considerable occasion to be on and near track No. 1 (R. 63, 64 and 75). He had a great many opportunities to observe the condition of the air pipe line (R. 64 and 75). He had had considerable experience on trains running in and out of the Farmington yards prior to the period just above mentioned (R. 62). The air pipe line had been in substantially the same condition for a period of at least five or six months before the accident (R. 65) and he is, of course, presumed to have known of its location and condition.

If he went in between the caboose and car next to the caboose as plaintiff claims he went in with a knowledge of the condition of the air pipe line in question, he, of course,

fully appreciated the dangers and risk of his working between the cars in the vicinity of the air pipe line and he must have appreciated the dangers to be reasonably anticipated in working at and about such air pipe line at the point where it was bulged.

Special attention is called to the case of *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 41 Sup. Ct. Rep. 162. In the Berkshire case the United States Supreme Court holds that an engineer who has passed over a particular route many times must be presumed to know of the existence of a mail crane when such mail crane was visible from the engineer's seat. This case we consider of special importance on this feature of the case and we therefore take the liberty of quoting rather extensively from it. On page 416, the Court said:

> "The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers."

On page 416, the Court stated as follows:

> "Linder has been upon this route for some years, has passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat, half a mile ahead through a front window. About

a mile before reaching Carney, Linder had notice that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indicate that he was more than fourteen inches out from the engine's side."

On page 118, the Court further said:

"It is going very far to leave it open to a jury to attach liability in tort to a system by which the end of the arms of postal cranes come to fourteen inches from the car.

But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

See also:

Tuttle, Admr. v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30 L. Ed. 1154.

Little Rock & M. R. Co. v. Wanley, 56 Fed. 1000.

The air pipe line in question constituted a part of the equipment of the Farmington yard (R. 78). If Linder in the Berkshire case was presumed to have known of the mail crane and to have known the danger to be expected therefrom, it seems clear that Coogan must be presumed to have known of the air pipe line and its condition and to have known the dangers to be expected therefrom by a brakeman coupling up the air from the south side of the train on track No. 1 while cars were being kicked into and shoved against said train. He, of course, knew that he might be required to get out from between the cars very rapidly and that any obstruction might be fatal. Of course, it should be kept in mind that it was the duty of the head brakeman to couple up the air and not the duty of decedent (R. 24).

We submit that the reasoning of the United States Supreme Court in the Berkshire case is applicable and controlling in the present case on the question of assumption of risk and that it appears as a matter of law that Coogan assumed the risk of the method of construction and condition of the air pipe line in question and that such assumption of risk under the Federal Employer's Liability Act prevents a recovery on behalf of the plaintiff in this case.

It is, of course, regrettable that no one knows the manner in which Coogan met his death and it is indeed unfortunate that the plaintiff is not in a position to show the manner in which her husband met his death in order that the Court may be in a position to decide whether or not the defendant company was or was not responsible for such death.

However, as indicated in the Patton and other cases mentioned above, juries should not be permitted to substitute sympathy for evidence in arriving at verdicts.

The manner in which Coogan met his death and the proximate cause thereof is purely speculative and conjectural and the plaintiff has failed to prove a right of recovery as against this defendant under the Federal Employer's Liability Act.

We submit that the plaintiff has failed to prove a cause of action under the Federal Employer's Liability Act and that the decision of the Supreme Court of the State of Minnesota is at variance with the holdings of this Court.

Respectfully submitted,

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
25 Milwaukee Depot,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Of Counsel:
O. W. DYNES,
Chicago, Illinois.

Service of the foregoing brief and argument in behalf of petitioner is hereby admitted this 23d day of November, 1925.

Lee Pettijohn
Attorneys for Respondent.

Sheehan
Goodwin
Counsel for Respondent

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WM. R. STAN

No 268

Supreme Court of the United States

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
25 Milwaukee Station,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Of Counsel:
O. W. DYNES, ESQ.,
Chicago, Illinois.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

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REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

Statements are made in respondent's brief which are inaccurate and misleading and for that reason it is thought advisable to file this brief and argument in reply to respondent.

It is important to keep in mind that only one act of negligence was pleaded or is claimed by the respondent, to wit: That the air pipe located on top of the ties and south of the rails of track No. 1, was defective and that such defective condition was the proximate cause of decedent's death. Respondent does not and could not claim that the train itself was improperly handled.

Her claim is that it was the duty of decedent to couple up the air hoses on the train in question. That certain air hoses had been coupled up and, therefrom infers that decedent was attempting to couple up the air hoses between the caboose and the car attached to it when he was killed.

Relying on testimony of Odekirk she claims men, in coupling air hoses, face the engine and under the circumstances would have their left foot outside the rails. She also claims that decedent's left shoe was under the air pipe line and became fastened under same at the alleged defective place when the train was shoved to clear the lead track. In support of this she relies on the slight indentation appearing on the outside counter of the heel of decedent's left shoe, noticed sometime after the funeral.

The important ultimate facts to be determined are: Was decedent's left foot caught under the air pipe line at the time of the accident and did this proximately contribute to his fatal injuries.

Respondent must, of course, show petitioner violated a duty which it owed to decedent. Respondent's claim is that decedent at the time of the accident was coupling air between the caboose and car attached to it and that it was his duty to do so. That the petitioner owed the duty to furnish decedent a safe place to work and the claimed defective air pipe line made it unsafe.

In the last paragraph of page 3 of respondent's brief it is stated that Dubke coupled up the air four cars from the engine and then found that air was escaping from the end of the train. This is misleading as Dubke testified he made other couplings before the body was discovered (R. 24). This undisputed testimony conclusively shows that Coogan did not couple the air hoses on all of the cars as claimed by respondent.

On page 4 respondent states:

> "The kicked up condition of the ground and the blood found just opposite the south rail of track 1, indicated Coogan's body had been dragged a distance of 15 feet."

Respondent's witness, Coroner Engelbert, testified the body appeared to have been dragged for ten feet, that is, the ground was scuffed up to a point about ten feet west of the body (R. 10 and 11). Her witness, Jeffers, testified the ground looked as though Coogan had been dragged eight or ten feet (R. 18), while her witness, Odekirk, said the body had been dragged, he would judge, a distance of ten or twelve feet, maybe fifteen. The testimony of respondent's own witnesses indicates the body was dragged about ten feet.

On page 5 respondent states that fifteen feet west of the body the air pipe line was in a defective condition. In support of her statement respondent refers to pages 39, 40 and 41 of the record. The only testimony on this feature, on the pages mentioned, is that of the witness, Odekirk, alias Murphy, who testified:

> "How far from the body was it that, or how far from the body was it to where you noticed the condition of the pipe that I have called your attention to?
>
> A. About a car length and a half. Perhaps I don't understand your question.
>
> Q. How far from the body was it to the particular place where you noticed the condition of this air pipe?
>
> A. It was a half a car length, I should judge."

Odekirk also testified that the average box car is forty feet long (R. 45) or in other words, he testified the bend in the pipe was from 20 to 60 feet west of the body.

Several pictures were taken showing the location of the body and the nearby cars. Several of them showed the entire second car ahead of the caboose and about half of the third car ahead of the caboose, or in other words, showed the cars and air pipe line for a distance of about 30 feet west of the body. Mr. Lieb, who took the pictures men-

tioned, testified the bend or bulge in the pipe was west of the area shown in the pictures (R. 64). He also testified the bend or bulge in the pipe was 40 or 50 feet west of the body.

Exhibit "G" referred to on page 5 of respondent's brief was taken from under the third car ahead of the caboose for the purpose of and did show the ties and ballast in the opening between the second and third car where the hat was found (R. 72).

There was no evidence indicating that Coogan, on the morning of the accident, was in the immediate vicinity of the bend in the air pipe line. Respondent's statement that the bulge or bend in the pipe was 15 feet west of the body, is incorrect.

On page 5 of her brief respondent states the counter of the left shoe had a round depression running parallel with the sole of the shoe. This is misleading as the depression was nearly round in shape. On page 5 respondent states:

> "The shoes were in the same condition at the time they were taken from the body as when offered in evidence."

This statement is merely a presumption not based upon the evidence. Messrs. Goodwin and Gephart, witnesses for respondent, were the sole witnesses on the condition of the left shoe. The evidence actually shows that Goodwin, one of the attorneys for respondent, visited the undertaker about ten days after the accident and saw the shoes (R. 53); that Undertaker Gephart, after removing the shoes from the body, put them in his garage. That quite a while after the body was shipped to Austin, Messrs. Sheehan and Goodwin, the respondent's attorneys, called on Gephart and he gave the shoes to them (R. 27). The shoes were kept because

bums ask for them and not because of any peculiar condition of the shoes (R. 28). Gephart paid no particular attention to the shoes when in the garage (R. 29). He kept a car, a delivery truck, packing for furniture and sometimes boxes, in the garage (R. 29). This witness testified on direct examination as follows:

> "Q. At the time you gave those shoes to me was your attention called to anything in connection with the shoes? * * *
>
> A. Yes, you said there was a mark on the counter of one shoe, and you said, 'Look at that.'
>
> Q. Did I show it to you?
>
> A. Yes.
>
> Q. I called your attention to the left shoe, the outside of the counter above the heel?
>
> A. I don't remember which shoe it was" (R. 29).

He further testified:

> "Q. That is the first time you had any recollection of seeing this mark on the counter of the shoe was when Mr. Sheehan called your attention to it?
>
> A. Yes" (R. 29).
>
> "Q. Have you any personal recollection of the condition of those shoes at the time they were taken off Mr. Coogan's body?
>
> A. No" (R. 29 and 30).

In the first paragraph on page 1 of respondent's brief it is stated:

> "It appears that it was the duty of Coogan to couple the air on this freight train."

Plaintiff bases this solely upon the following quoted testi-

mony of her witness, Oldekirk, who was a member of the switching crew:

"Q. Was it any part of the duties of your crew, yourself and Dulke or any of your crew, to couple that air?

A. No.

Q. Whose duty was it?

A. The duty of that crew of 92.

Q. Who, of the crew of 92?

A. Mr. Coogan and Bellamy and Jeffers."

Respondent's witness Dulke, the only other witness to testify on this feature of the case makes it definite as to which member of this crew owed the duty to couple the air and states that it was the duty of Mr. Bellamy, the head brakeman of crew 92. Mr. Dulke testified:

"Q. Was it your duty to couple up the air?

A. No.

Q. Whose was it?

A. The head brakeman of the road crew.

Q. Who was the head brakeman?

A. Mr. Bellamy.

Q. How did it happen that you coupled up the air?

A. I did it for him for a favor. I did not have to do it" (R. 24).

The testimony of respondent's own witnesses, therefore, shows that it was the duty of Mr. Bellamy, head brakeman, and not the duty of Mr. Coogan to couple up the air in question. Therefore, petitioner, at the time in question, owed no duty to furnish Coogan a safe place to couple up air hoses.

The following erroneous statement is also made in the paragraph of respondent's brief just referred to:

"With the exception of the coupling between the car house and the next car thereto the couplings had all been made prior to the accident except the coupling between the last four cars put in and the two cars above referred to."

In support of this statement respondent refers to the testimony of H. W. Engelhart, the conductor of Dahlonega Journey, who arrived at the scene of accident at nine o'clock (R. 24) or about two hours after the accident.

Respondent's witness Dahlke testified that he coupled up the air on various cars. His testimony is as follows:

"Q. What is your best estimate as to the number of cars you did couple up the air on?

A. Two or three of them" (R. 28).

Dahlke did not know whether or not air was coupled in the various cars of cars kicked in on track No. 1 (R. 25). In other words, Wingate may or may not have coupled up the air on cars in the train. There is no proof that he did. There is no proof that either Jeffries or Dahlonega did not couple the air or that one of the investigators after the accident didn't couple up the air on some of those cars. There isn't a scintilla of evidence that Wingate coupled up the air on any car in the train. Respondent, by her witness, Dahlke, agreed that it was the duty of the road crew to couple up the air hoses and then followed this by testimony of her witness, Dahlke, and proved that of the road crew it was the duty of Head Brakeman Dahlonega to perform this work. It is interesting to note that Dahlke testified after Dahlke and explained the testimony of Dahlke in this regard. It is also interesting to note that Dahlonega was never called as a witness and neither side asked him if it was his duty to couple the air hoses. It appears, therefore,

that both sides were satisfied that it was Delhanty's duty. There is no evidence that Coogan coupled up the air on any car and respondent's own witnesses show that Delhanty and not Coogan owed the duty to couple up the air on the train in question. Respondent's proof also shows that the air was also coupled up at more than one place in the train by her witness, Dubke. On page 9 of her brief respondent states in substance, that petitioner did not, in the State Court, dispute that it was Coogan's duty to couple the air. This matter was not referred to specifically in petitioner's brief in chief in the State Supreme Court and no reply brief was introduced in the State Supreme Court. Counsel apparently has either overlooked or forgotten that petitioner argued this matter orally before the State Supreme Court. The proof shows it was not Coogan's duty and no concession has been made in this respect.

On page 9 respondent in summary states:

> "It being his duty to make this coupling and the fact that he had made all the other couplings of the air with the exception hereinbefore referred to, and it being shown that he was at this point, it is a fair inference that he was engaged in the performance of his duty."

As previously stated it was Delhanty's and not Coogan's duty to couple up the air. There is no proof that Coogan coupled up any air on the train. Therefore, the inference that he was engaged in the performance of a duty owed the defendant at the time of the accident is not based upon any fact proven in this case.

The inference that Coogan had coupled up the air hose on other cars of the train and that he was coupling up the air between the caboose and car attached to it is very im-

probable. The air hoses just mentioned were not coupled after the accident. When the first cut of cars was coupled onto the caboose Coogan was standing next to the caboose (p. 25). If it was his duty to couple the air hoses between the caboose and car attached to it he would, of course, be apt to couple up the air at once after the first cut of cars coupled onto the caboose because he would know that the cars would not be moved until Dubke returned with another cut of cars. The inference in which respondent indulges, to the effect that Coogan at the time of the accident was in the act of coupling the air between the caboose and the car attached to the caboose, seems inconsistent with the facts proved in this case.

On pages 9 and 10 of her brief, respondent states the position which she claims Coogan was in at the time of the accident. The claim is that the natural position for Coogan to take would be to place his right foot inside the rail and left foot outside the rails and inside of the air pipe line, facing the engine. There is no proof as to the position Coogan ordinarily took in doing work of this character. Respondent claims testimony of her witness Odekirk, as to the natural position in doing this work, is sufficient basis for the jury finding that Coogan coupled up air in the manner they claim, that is, with right foot inside and left foot outside of the rails.

Petitioner's witness Binko, a yard master and trainman of twenty years, testified he had never seen a man couple up cars with his right foot inside the rails and his left foot outside the rails and pointed out it would be dangerous to do the work in that way (R. 90, 91 and 92). The testimony of Trainmaster Lieb (R. 61), General Car Foreman Palmer (R. 70 and 90), and General Freight Car Foreman Hem-

sey (R. 89) coincides with that of Binko. It is stated, however, that some small men have both feet inside the rails (R. 88 and 89). Coogan's shoes were small and possibly he was small enough so that he could couple air hoses with both feet inside the rails. It is clear from the proof, therefore, that the best that can be said for plaintiff's contention is that there are several different methods of going in between cars to couple up the air and there is no proof as to what method Coogan ordinarily used in doing this work. The burden, of course, is upon the respondent to show Coogan was doing the work claimed and that he was doing it in the manner contended for. There is no proof to support either contention.

On page 10 the statement is made that petitioner's witnesses Lieb, Palmer and Hemsey had no experience in coupling air hoses. Of course, the statement is erroneous. The train master has supervision over the trainmen and, of course, in order to supervise and instruct the trainmen must know how to do the work. Train Master Lieb testified the last switching he did was for a period of two months, two years before the trial (R. 70 and 71). General Car Foreman Palmer testified he had experience in coupling and uncoupling cars, and of course, this includes air hoses, practically all of his life (R. 84). General Freight Car Foreman Hemsey testified he had had considerable experience in coupling and uncoupling cars and had observed switchmen, trainmen and carmen doing such work (R. 88).

Respondent had the burden of proving Coogan was coupling air hoses on the cars. She called Conductor Jeffers and Switchman Dubke as her witnesses but didn't ask them any question as to how to couple or uncouple air hoses. A statement that a train master and general car foreman are

not familiar with the manner of coupling air hoses on trains seems ridiculous. Petitioner's witness Binko also testified as to the manner of coupling air hoses and disagreed with Odekirk. Binko testified he had considerable experience in coupling and uncoupling air hoses as a yard foreman and trainman. He had worked for petitioner for ten years steadily and off and on for 20 years as brakeman, switchman and yard foreman (R. 89 and 90).

It seems inconceivable that a foot could become caught between a round iron pipe one and three-fourths inch outside diameter (R. 78 and 85), and flat ties and ballast. The bulge in the pipe was 12 or 15 feet long (R. 69) and could be bent by putting your foot against it (R. 68). At the maximum bulge the pipe was six inches or more south of the south rail of track No. 1 (R. 41 and 68) and was bent up three and one-half or four inches above the ties (R. 41). This is not like a crossing frog with sharp edges and flat surfaces where a foot may become wedged in and caught. The ultimate presumption indulged in by the respondent not only is not based on any fact in the case but is also an improbable one.

On page 19 of her brief, respondent refers to "defendant's admitted negligence." Defendant has made no such admission.

Respondent indulges in a large series of presumptions not supported by the facts in the case. Respondent presumes:

1. That it was Coogan's duty to couple the air hoses in the train.

2. That all the air hoses on the train were coupled immediately after the accident.

3. That Coogan coupled the air hoses on the entire train except the air hose coupling four cars from the engine.

The first three presumptions are disputed by respondent's witness Dubke.

4. That at the time of the accident Coogan was about to couple the air between the caboose and the car attached to it.

5. That he was standing in a stooping position and his foot slipped back.

6. That at the time he was at the point where the iron air pipe was bent or bulged.

7. That at the time of the accident he was standing with his right foot inside and left foot outside the rails.

8. That his left shoe did not have a dent on the counter before the accident.

9. That the dent in the counter of the left shoe, first noticed some time after the funeral, was caused in the accident.

10. That the shoe did not become scratched or dented while on the floor of the undertaker's garage.

11. That the shoe was indented in the accident but not on account of hitting some part of the car, rail, pebble, tie or air pipe line.

12. That the dent in the shoe was caused by the shoe and foot being caught under the round air pipe line.

13. That while his foot was fastened under the round air pipe his clothing was caught in the rigging of the car and he was thrown under the train and run over.

Authorities.

In her brief, respondent quotes from the case of *Union Pacific Company v. Huxoll*, 245 U. S. 535, 38 Sup. Ct. Rep. 187. In the Huxoll case it was claimed that the power brake on the locomotive was defective. The engineer was notified instantly that the engine had struck a man and he immediately applied the brake. The proof showed that if the power brake was in good order the engine could have been stopped in eight or ten feet and the proof showed it actually moved 135 feet. Huxoll's arm was run over by the middle driving wheel. This is, of course, considerably more than ten feet from either end of the engine. In that case, therefore, there were facts in evidence from which the inference could reasonably be drawn that the defective power brake was the proximate cause of Huxoll's fatal injuries.

In the present case it has not been shown that the bend in the air pipe line or that the air pipe line had anything to do with the accident or that the accident occurred at the point where the air pipe line was bent. On the contrary, the evidence shows the accident occurred from 15 to 35 feet east of the bend in the air pipe.

In the Huxoll case the defective power brake was applied to stop the engine and the only inference which it was necessary for the jury to decide in the Huxoll case was what effect the defect in the power brake had in the stopping of the engine and whether or not Huxoll would have been killed if the power brake had been in good condition. In the instant case there is no causal connection between the air pipe line and the accident.

Respondent cites *Myers v. Pittsburgh Coal Company*, 233 U. S. 184, 34 Sup. Ct. Rep. 559, which reverses an opinion

of the Circuit Court of Appeals of the Third Circuit, to-wit: *Pittsburgh Coal Co. v. Myers*, 203 Federal 221. Petitioners were not aware that this case had been decided by the United States Supreme Court when cited in their brief. We considered this case as a rather extreme one and were inclined to be skeptical of the soundness of the decision. Nevertheless, in as much as it was a decision of the Circuit Court of Appeals we felt that it should be given some weight until overruled by the United States Supreme Court. It will be noted that the case was cited without comment. The United States Supreme Court brought out certain facts not disclosed in the opinion of the Circuit Court of Appeals. In the Myers case the decedent was a brakeman on an electric train used underground in a coal mine. The electric motor kicked several cars to make a movement known as a flying switch. Decedent at this time and when last seen alive was standing on the bumper of the last car. The flying switch was made and the cars proceeded down on the track on which they were to move. Shortly thereafter the electric motor in following these cars ran over Myers. In the immediate vicinity of the accident an electric wire crossed the track only five feet and eight inches above the rails and it was shown that at this height a man standing on the car would be struck by the wire. Myers' hat with a lighted lantern upright lay beside him at the time he was run over. The headlight on the electric engine was defective so that Myers was not noticed on the track and it was shown that if the light had been in proper condition Myers could have been seen and the engine stopped.

The Circuit Court of Appeals' decision did not bring out the fact that Myers was alive when run over. The United States Supreme Court decision showed this fact and showed

that he was alive even after he was run over. The Supreme Court decision also brought out the fact that he was a young man of unusual strength and vigor immediately before the accident. On page 224 of the Circuit Court of Appeals' decision the Circuit Court indicated that it was of the opinion that Myers may have been killed by the current in the wire or by the fall from the car. The United States Supreme Court decision brings out the fact that this could not be true because he was alive after being run over by the electric motor. The evidence was such that the jury could properly find that Myers was not killed by coming in contact with the wire and could find that he was run over and killed on account of the defective headlight. The United States Supreme Court decision as indicated brought out the fact that he was an excellent physical specimen and it was also shown that the voltage in the wire was intermittent only and that it was doubtful whether or not the voltage would be of sufficient strength to materially injure the man in question. We think it clear, therefore, that the Myers case is not controlling.

On page 16 of her brief respondent quotes from the case of *Chesapeake & Ohio Railway v. Ware*, 95 S. E. 183, which in turn cites *Hinshaw v. State*, 147 Ind. 334. The rule stated in the case just mentioned seems to be in conflict with the rule laid down by this Court. The correct rule is stated in *United States v. Ross*, 92 U. S. 707, 23 Sup. Ct. Rep. 281 at 281, and is as follows:

> "A presumption which the jury is to make is not a circumstance in proof; it is not, therefore, a legitimate foundation for a presumption."

The inference must be drawn from a fact proved in the case. This is rather aptly expressed in *Reading Company v.*

Boyer (Circuit Court of Appeals, Third Circuit) 6 F. (2d) 185, at page 186. In this case Brakeman Boyer was last seen getting off the engine that ran over him. It was claimed that he stepped on the ground and lost his footing for the reason that at the place in question the track was unballasted and that he fell under the train in consequence thereof and was killed. The Court said:

> "As there were other ways in which Boyer might have met his death which did not involve negligence of the defendant, the case falls, we think, within the rule of *Murray v. Pittsburgh, etc., R. R. Co.*, 263 Pa. 398, 403, 107 A. 21, 23, followed by this court in *Philadelphia & Reading Ry. Co. v. Cannon*, 296 F. 302, wherein the Supreme Court of Pennsylvania said:
>
> > 'It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other.'

This is but another statement of the old rule that a party seeking to recover damages for injuries occasioned by negligence must establish negligence by affirmative testimony. *Of course, this does not mean that negligence must always be proved by the testimony of eye witnesses. Philadelphia & Reading Ry. Co. v. Effinger* (C. C. A.), 299 F. 950, *but it does mean that it must be established, if not by the testimony of eye witnesses, then by surrounding facts and circumstances which, though inanimate, speak the truth and affirmatively prove the*

fact. We cannot find in the record any testimony which tends to prove how Boyer met his death and, accordingly, we have not found any evidence to support the verdict of the jury that his death was occasioned by negligence of the defendant." (Italics my own.)

In the Boyer case the Court, on page 186, also said:

"There is no evidence which remotely indicates that the decedent 'lost his footing and was thrown under the train' because of lack of ballast."

In the instant case there is no evidence which remotely indicates that Coogan caught his left foot under the pipe where it was alleged to be defective and was caught by the rigging of the cars and thrown under the wheel.

On page 17 of her brief, respondent in endeavoring to distinguish *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 21 Sup. Ct. Rep. 275, says:

"In the Patton case there was no evidence tending to point to any one particular cause for which the master would be responsible."

We think a like statement should properly be applied to this case. Coogan was the rear brakeman. Men in that position ordinarily ride in the caboose or in other words, the rear end of the train. He must have known that the train would leave in a very short time on its journey but he may not have known that the train was to be moved immediately. At the time of the accident it is very probable that he was in the act of getting on the caboose and had his right foot on the step and that his left foot was still in the air when the cars were moved so that the caboose moved away from him and he lost his balance and fell on the track between the caboose and the car attached to it and was run

over by the last mentioned car. Under these circumstances his left leg and arm would be apt to be inside the rail and the right side of his body outside the rail. If the accident happened in this manner there would, of course, be no liability.

He may have been approaching the caboose from the south and tripped over the end of the ties and fallen on the rail just as the train was moved and in endeavoring to scramble out was caught and run over. If the accident happened in this manner there, of course, would be no liability.

He may, as railroad employes sometimes do, have stepped in between the caboose and the car attached to it to answer a call of nature. He may have been entirely inside the rails preparing to couple the air hoses and have been knocked down by the train when the cars were shoved to the east. He may have been between the caboose and car attached to it for the purpose of coupling the air hoses, as claimed by respondent, but with his right foot outside the rail and his left foot inside the rail, facing the angle cock and while in such position have been hit by the cars moving backward and knocked on the rail so that the left arm and leg were inside the rail and the right side was outside the rail. Under any of the above presumptions there would, of course, be no liability and we feel that the above inferences are just as consistent with the evidence as respondent's theory. We feel, however, that there is insufficient evidence on which a jury could find that any one of the above presumptions or the presumption indulged in by the respondent was the actual manner in which Mr. Coogan lost his life.

Assumption of Risk.

Certain cases were cited by respondent on the question of assumption of risk. In *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. Rep. 229, it was held that an employe injured by the derailment of a three-wheeled gasoline car on which there was a defective flange, was not presumed to know of the defect where he had been employed in work that required him to ride on such gasoline car for a period of a few days only prior to the accident. This case does not appear to be in point. Coogan had worked on trains 91 and 92 for three or four months and had had considerable experience on trains running in and out of the Farmington Yard prior to that period of time (R. 56, 62, 63, 64 and 75). It would seem that Coogan should be presumed to know of the conditions existing on and around the track on account of his extensive experience working in and around that track.

Chicago, Rock Island & P. Ry. Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. Rep. 840, is a case where a brakeman after repeated unsuccessful attempts to uncouple moving cars by the uncoupling lever, found it necessary to reach in between the cars to lift the pin. The cause of action, therefore, was governed by the Federal Safety Appliance Act. Under that act contributory negligence and assumption of risk are not available as defenses.

In the present case the rights and liabilities of the parties are governed by the Federal Employer's Liability Act. Under this act contributory negligence is a comparative defense while assumption of risk is an absolute defense. The Brown case, therefore, is not in point as the statutes involved are radically different. The Brown case is so dissimilar from the present case as to be of no assistance to

the Court on any phase of the matter before them.

The quotation from the Brown case on page 20 of respondent's brief, if read in connection with the balance of the decision, shows that the United States Supreme Court agreed with the conclusion reached by the trial court and the Circuit Court of Appeals and therefore affirmed the lower court.

Texas & Pacific Railway Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. Rep. 518, involved the interpretation of the statute of the state of Texas relating to assumption of risk and that portion of the decision should, of course, be disregarded.

In *Texas & Pacific Railway Company v. Swearingen*, 196 U. S. 57, 25 Sup. Ct. Rep. 164, it appears that a switchman riding on the side of a string of box cars was swept off the car by coming in contact with a scale box located only two feet from the rail. The accident happened at night and he was looking to the rear for signals. He had not observed the scale box carefully, prior to the accident, had taken no measurements and had merely observed it from a distance and was unaware of its nearness to the track. This decision would also appear to be of little benefit in the instant case.

The decisions cited by petitioner in its brief in chief on assumption of risk would seem to be controlling.

Minnesota Decisions.

On page 13 and on page 15 of her brief respondent has referred to certain decisions of the Minnesota Supreme Court. None of these decisions involve facts similar to those of the instant case. The decisions speak for themselves and a discussion of them in this brief would not seem to be particularly helpful. Most of these decisions were discussed in petitioner's brief on the appeal to the State Supreme Court

and features distinguishing them from the Coogan case were pointed out.

The Minnesota Supreme Court apparently placed considerable reliance on the case of *McIntosh v. G. N. Ry. Co.*, 151 Minn. 527. In that decision the Chief Justice and one of the four Associate Justices, on reargument, dissented to the opinion of the majority. We feel that that decision is at variance with the rule adopted by this Court.

It is clear that the Minnesota Supreme Court was very skeptical of the soundness of their position in the instant case. The decision is reported on pages 104 and 105 of the record and contains the following:

> "On the left side of the *defendant's* left shoe just above the heel was an indentation such as *might* have been made if it had been caught beneath the air line."

In other words the indentation didn't point to the fact that the shoe was caught, but they merely held that if the shoe was caught such an indentation might have been made. The important thing is, was the shoe caught. The Court also said:

> "The position of the body of a man who has met his death in a violent accident, or physical marks thereon, usually do not furnish persuasive proof of the manner of the occurrence."

In other words, the State Supreme Court recognized the fact that the nature of Coogan's injury to his left leg and left arm were inconsistent with a theory that his left foot was outside of the rails.

If physical marks on a body do not furnish persuasive proof of the manner of the occurrence it would seem the same reasoning would apply to physical marks on a shoe

on the foot of the same body. In other words, the dent in the counter of the shoe doesn't show that it was caught under the air pipe line.

The Court also stated:

> "*Though the case is a close one* we reach the conclusion that the finding of a causal connection between the bent air line and the death of the decedent has substantial evidence in its support." (Italics my own.)

In some of their decisions the Minnesota Supreme Court has adhered more closely to the rule that verdicts must not be based on speculation and conjecture.

See *Perkins v. G. N. Ry. Co.*, 152 Minn. 226.

Bruckman v. C., St. P., M. & O. Ry. Co., 110 Minn. 309.

This last decision, in the index to petitioner's brief in chief, was erroneously cited as 220 Federal 553.

The case of *Truax v. Mpls., St. P. & S. S. M. Ry. Co.*, 89 Minn. 143, is a well reasoned decision. In that case a mail agent while throwing a mail bag from a depot platform to a passing mail car, lost his balance and fell between the platform and train and was seriously injured. Two weeks after the accident he investigated the premises and decided that he was at a particular point on the platform because the platform gave under his weight in the same manner that it did at the time of the accident. On page 146 of the decision, the Minnesota Supreme Court stated as follows:

> "At the trial he said he did not slip or stumble on anything and did not know what it was that caused him to lose his balance until about two weeks after the accident when upon examining the platform he discovered the loose planks and that when stepped upon at the outer edge they would give under his weight. His only

method of connecting this condition of the platform with the accident was the fact that he found by stepping upon the planks he experienced a similar sensation to that which he felt after throwing the bag into the car."

On page 147, the Court further said:

"*In the absence of positive proof that the planks were actually stepped upon and at a point where they gave way under the weight imposed upon them, the whole matter is left in the realm of pure conjecture. Verdicts based upon evidence of this character cannot be permitted to stand. There must be a definite and reasonable connection between the cause and effect. Juries are not permitted to speculate in arriving at a conclusion, however unfortunate the result may be for the injured person.*" (Italics my own.)

The above case, we feel, is controlling for the reason that in that case the plaintiff was unable to connect the defective condition up with the accident. In the instant case there is absolutely no competent evidence either direct or circumstantial to show or indicate that William Coogan's foot was caught or fastened under the alleged defective air pipe line. There is absolutely no proof to show that either of his feet were ever under the air pipe line at the point where it was bent or at any other point. There is no proof that he was on the day in question, ever in the immediate vicinity of the air pipe line where it was claimed to be defective. There is absolutely no proof whatever that the air pipe line caused or contributed or had anything whatever to do with Coogan's death.

We respectfully suggest that the decisions of this Court

cited by the petitioner in its brief in chief are controlling in the instant case.

Respectfully submitted,

F. W. Root,
C. O. Newcomb,
A. C. Erdall,
25 Milwaukee Station,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Of Counsel:
O. W. Dynes, Esq.,
Chicago, Illinois.

Service of the foregoing reply brief and argument on behalf of petitioner is hereby admitted this 12th day of April, 1926.

S. A. Anderson,
Attorney for Respondent.

No. 268

FILED
FEB 23 192
WM. R. STANS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. ————.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

EDITH F. COOGAN, as Special Administratrix of the Estate of WILLIAM COOGAN, Deceased,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LYLE PETTIJOHN,
427 Metropolitan Bank Bldg.,
St. Paul, Minnesota,
Attorney for Respondent.

T. D. SHEEHAN,
H. J. GOODWIN,
427 Metropolitan Bank Bldg.,
St. Paul, Minnesota,
of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The respondent as special administratrix of William Coogan, deceased, brought this action in the District Court of Dakota County, Minnesota, in behalf of herself and her six minor children, to recover for the wrongful death of William Coogan, the husband and father.

The respondent had a verdict in the trial court for thirteen thousand five hundred ($13,500.00) dollars. The petitioner then moved for judgment non obstante, which was denied.

The petitioner then appealed from the judgment to the Supreme Cout of the State of Minnesota, where the judgment of the lower court was affirmed, and judgment entered in the Supreme Court of the State of Minnesota, on the 13th day of November, 1924, in respondent's favor, and against the petitioner in the sum of Fourteen Thousand Three Hundred Sixty-three and 29-100 ($14,363.29) Dollars.

STATEMENT OF FACTS.

William Coogan, the deceased husband of respondent, had been in the employ of the defendant over fourteen (14) years. On the 14th day of July, 1923, he came to his death while employed as a railway brakeman on what is known as defendant's freight train 92. The run of this train was from Farmington to Austin, Minnesota. Train 92 was an Interstate train, and at the time that Coogan was killed, was engaged in Interstate commerce.

Train 92 was made up in the yards at Farmington, Minnesota, a little after 7 o'clock A. M. on the day in question by what was known as the switch crew, of which John Marshall was conductor, and Dubke and Odekirk were brakemen. (Record page 23, Folios 67-69.)

The first movement in making up of train 92 was to kick the caboose belonging to this train back and east on what is known as track 1. The tracks at that place run in an easterly and westerly direction. Coogan rode the caboose in on track

t, and stopped it by applying the hand brakes. (Record page 23, Folio 69, page 59, Folios 175 and 176.)

The next movement in the making up of this train was for the switch engine to couple onto two cars, bring them to the lead track, and while in motion, cut them off from the engine and kick them down on track 1. Dubke rode those cars in as they were moving back in an easterly direction toward the caboose on track 1, riding the front car, and controlling their movement by hand brakes, allowing them to couple to the caboose (Record page 24, Folios 70 and 72, page 39, Folio 118, pages 59 and 60, Folio 177.)

The next movement in the making up of the train was for the switch engine to couple onto nine or possibly ten cars, taking them to the lead, cutting them off from the engine and kicking them back on track 1, in the same manner as the former cut, Dubke riding them in, allowing them to couple to the first cut. (Record page 60, Folios 178, 179.)

The next movement in the making up of this train, the switch engine coupled onto either three or four cars, and moved with the cars back onto track 1 with the engine attached, until they coupled onto the cars last put in. This was the final cut, and constituted the entire train. (Record pages 60 and 61, Folios 180 and 181.)

After this last cut of three or four cars had been coupled to the train, and the engine had stopped to see if the automatic coupling had made, they found it necessary to move the entire train back

in order to clear the switch, and they moved the entire string of cars, or train backward in an easterly direction in the neighborhood of two car lengths. (Record page 61, Folio 181.)

They then uncoupled the switch engine from the train, and the road engine was immediately coupled thereto, and when the air hose was connected between the engine and the first car, the engineer attempted to pump up the air train line but was unable to do so for the reason that the air coupling had not been made between the last, and second cut of ten cars put in the train. This air coupling was then made by Dubke, and when made it was found that air was escaping at the rear end of the train, the air hose not having been coupled between the caboose and the car attached thereto. Dubke then started back to the rear end of the train, and when some distance back, discovered the body of Mr. Coogan. (Record pages 62 and 63.)

It also appears that it was the duty of Coogan to couple the air on this freight train, and that with the exception of the coupling between the caboose and the next car, the couplings had all been made prior to the accident. (Record page 17, Folio 50, page 45, Folio 134, page 74, Folio 221.)

Coogan's body was found near the west end of the second car from the caboose. His body was lying parallel with the tracks, outside the south rail, and on or just at the end of the ties. (Record page 17, Folio 57, page 32, Folio 94, page 64, Folio 191.)

The kicked-up condition of the ground, and the blood found just outside of the south rail of track 1, indicated that Coogan's body had been dragged a distance of at least ten to fifteen feet. (Record page 67, Folio 200.)

The rear wheel on the south side of the car coupled to the caboose had blood on it. There was no blood found on any other part of the train. (Record page 19, Folio 56, page 33, Folios 97, 98.)

A piece of Coogan's clothing was found on the bolt passing through the journal box holding the anchor bar on the journal box of the rear wheel of the car coupled to the caboose, being the same wheel on which blood was found. (Record pages 34, 35, 55 and 64.)

Coogan's hat, his false teeth, part of his tongue, and flesh from his face, was found between the rails of the track, some of them close to the south rail about fifteen feet west of where his body was found. (Record pages 35, 47, 48.)

The entire lower part of his face was gone. His left leg and left arm were badly mashed, so that the undertaker had to put casts on them. The little finger of his left hand was crushed. (Record page 36, Folio 106, page 4, Folio 144, page 55, Folio 165.)

Immediately south of the south rail of track 1 there was an air pipe line on top of the ties, and extended along the track for a distance, perhaps, of eight hundred to a thousand feet. This air pipe line when in normal condition was fastened to the ties by clamps or spikes about twelve inches out

from the south rail of the track, and close to the ties, leaving no space between the pipe line and the ties to which it was fastened. This air pipe line at a point about fifteen feet west of where the body was found, was in a defective condition. That for a distance of at least fifteen feet, the fastenings had been torn loose, and the air pipe line bent inward and up from the ties, leaving a space of about three and one-half to four inches between the ties and the air pipe line, and bent in toward the rail possibly three or four inches. That the pipe line at this place had been in this condition for possibly four or five months prior to the accident. (Record pages 70, 71, 72 and 73.)

Defendant's Exhibit "G," a picture of the front end of the rear truck of car three was taken for the purpose of showing where the hat was found, estimated to be about fifteen feet west of the body. (Record pages 129, 130.)

It was also shown that a man stepping in between the cars from the south side to couple the air on the train standing as this train was, that the natural position for him to take would be to step inside the south rail with his right foot, leaving his left foot immediately outside the rail, but inside of the pipe line. (Record pages 73, 74.)

There was introduced in evidence the shoe worn by the deceased at the time of the accident, showing a very marked rounding depression on the counter of the left shoe on the outside of the shoe running parallel with the sole of the shoe, and

just above the heel. That the shoes were in the same condition at the time taken from the body of the deceased as when offered in evidence, except that the depression in the counter of the shoe was not so marked to the eye at the time of trial. The outside leather covering the counter of the shoe having appeared to have ironed itself out to some extent. (Record pages 50, 51, 52, 53 and 94.)

The standard gauge of the railroad track is four feet eight and one-half inches, and the width of the box cars such as used on this train nine feet. The length of box cars thirty-three to forty feet. (Record pages 69 and 70.)

POINTS AND AUTHORITIES.

What *facts* were established by the evidence in this case were for the jury. It is equally true that if the *inference* to be drawn from the facts proven are not certain and conclusive, then the *inferences* proper to be drawn from such facts are for the jury.

This rule is well expressed by the late Justice Mitchell in a case that has frequently been cited by the Courts of Minnesota, in this class of cases. In Abbette v. Milwaukee, 30 Minn. 482:

> "Negligence is ordinarily a question for the jury. It is always so, where the evidence on a material point is conflicting, or where the facts being undisputed different minds might reasonably draw different conclusions from them. Negligence cannot be conclusively established as a matter of law upon a state of facts on which fair minded men of ordinary intelligence may differ as to the inferences to be drawn; and when the question of negligence arises upon even a conceded state of facts from which reasonable minded men might arrive at different conclusions, it must be submitted to the jury, and if the *inferences* to be drawn from the evidence are not *certain* or *incontrovertible* the question of negligence cannot be passed upon by the Court. The evidential facts may be all admitted, and yet the question of negligence not be a question for the Court; for in such case this is the *main fact*. The existence or nonexistence of which is to be inferred from the *other facts*." (Italics in all cases ours.)

See also N. P. Ry Co. vs. Egeland, 163 U. S. 93.
Texas & Pac. Ry. Co. vs. Gentry, 163 U. S. 353.
Sioux City & P. Ry. vs. Stout, 17 Wall. 657.

This case was tried upon, and it is the theory of respondent, that after the last cut of three cars were coupled onto the train with the switch engine attached, and stopped to see if the automatic coupling was properly made, Coogan already having made all the other air couplings then stepped in between the caboose and the rear car to make the last air coupling, with his right foot inside the rail and his left foot outside the rail between the south rail and the air pipe line on the ties, and when in stooping position his left foot slipped backward, and under the air pipe line, and before having had time to couple the air, the cars started backward in the movement being made to shove them into clear, and when he attempted to straighten up he found his foot caught and could not free his foot from beneath the air pipe line, and he was forced backward by the cars, and fell to the ground outside the south rail, receiving the injuries causing his death. The above in substance is what the jury must have found by its verdict.

While it is not necessary for defendant to show the manner in which the accident happened we call attention to the fact that there is not a suggestion or intimation in the evidence, or a fact disclosed by the evidence from which it could possibly be inferred that the accident could

have happened in any manner other than the one contended for by the respondent.

The evidence in this case furnishes a reasonable basis for the finding, that at the time of the accident Coogan was between the caboose and the car coupled thereto, in an attempt to couple the air at that point. The air on this train, except the last cut of three cars had all been coupled before the accident, with the exception of that between the caboose and car coupled thereto. The air coupling between the second and third cars from the caboose, and such other air couplings as were necessary to be made in other places in this string of cars were made by Coogan during the time this train was being made up. Delhanty, the other brakeman of the road crew, was in the west end of the yard, and Jeffers, the conductor, was also in the west end of the yard. Coogan was the rear brakeman, so the other members of the road crew had nothing to do with this air coupling that had been made. It was Coogan's duty to couple the air. This fact was not disputed in the trial court or the supreme court of the State, and is suggested for the first time by the petitioner in his brief in this Court, basing it upon the answer of Dubke when speaking about the coupling made by him after the road engine had been put on, when referring to the coupling made between the last cut of three cars and the former cut of ten. That Coogan was engaged in an attempt to make this last coupling between the caboose and the first car there can be no question. That he was at the open-

ing between the caboose and the car coupled thereto is shown conclusively by the blood on the rear wheel of this car coupled to the caboose, and by parts of his clothing being found on the bolt through the oil box of the journal of the same wheel. There was no blood on any other part of the train. It being his duty to make this coupling, and the fact that he had made all the other couplings of the air with the exception hereinbefore referred to, and it being shown that he was at this point, it is a fair conclusion that he was engaged in the performance of his duty.

The evidence furnished a reasonable basis for the jury to find that the natural position for Coogan to take in making this coupling was with his right foot inside the rail, and his left foot outside, and inside the air pipe line, and that just before the train started moving backward to put the cars into clear, and while in a stooping position, his left foot slipped beneath the air pipe line and became caught. Mr. Odekirk, who had years of experience in that line of work testified that this would be the natural position for him to take, so that he would be facing the engine. That it is customary for men, when working around trains of that kind to work facing the engine. The petitioner and defendant called Mr. Lieb, Mr. Palmer and a Mr. Hemsey, who had never had any experience whatever in coupling air hose, and they testified to the effect that the natural position for a brakeman to take in attempting such a coupling would to to step in with his left foot inside the

rail. The jury were justified in believing the man who had years of experience in doing that work.

The evidence also furnished a reasonable basis for the jury to find that the opening between the caboose and the car coupled thereto, before they started to shove the train into clear was opposite the defective condition in the air pipe line when Coogan stepped in to make the air coupling, and while in a stooping position his left foot became caught, slipping back under the air pipe where there was a space of between three and one-half and four inches between the pipe and the ties so that the cars in starting backward forced him to the ground outside the rail and inside the pipe line causing the injuries resulting in his death. The blood on the rear wheel of the car coupled to the caboose, and a part of his clothing on the bolt through the journal of the same wheel showing conclusively that Coogan was at this opening between the caboose and car. His body was found approximately at the west end, or front end of the second car from the caboose. The blood and kicked-up condition of the ground outside the south rail showed that his body had been dragged a distance of at least fifteen feet. His hat was found in the neighborhood of fifteen feet west of the body, and beneath the rear trucks of the third car from the caboose. His teeth, tongue and pieces of flesh nearby, just inside the south rail. *The defective condition of the air pipe line was about fifteen feet west of the body, conclusively showing that the opening between the caboose and the first*

car were opposite the defective condition in the air pipe line when they started to shove the train into clear. Then take into consideration that after Coogan had been forced to the ground outside the south rail, he might have been carried a short distance without any evidence of dragging, and before the wheel caught his left leg. The mark or more properly speaking the rounding depression in the counter of his left shoe on the outside of his shoe, and running parallel with the sole of his shoe is convincing if not conclusive evidence of how he was caught. In this connection we wish to note that the undertaker testified that when he delivered Coogan's shoes to one of the attorneys for the respondent, his attention was called to the mark or rounding depression in the counter of the left shoe, also in effect that he noticed no difference in the condition of the shoe, at that time from what they were when removed from the body. The nature of Coogan's injuries themselves are strongly corroborative of the manner in which he was caught and of the position he was in when the injuries occurred. It does not appear that the right side of his body was injured at all to speak of. He could not have freed his left foot from beneath the air pipe line until he was forced back by the cars so that his body became practically parallel with the pipe line, and close to the ground. This would practically force his body in the space between the air pipe line and the rail with the knee part of his left leg over the south rail in a

bent position. The undertaker testified his left leg was so badly mashed, as he expressed it, that he had to put a cast on it. The wheel would next reach his left arm. His arm was also caught by the wheel, and so badly mashed that a cast had to be placed upon it. The little finger on the left hand was mashed and crushed by the wheel. The lower part of his face was mashed and gone, leaving part of his tongue, false teeth and flesh just inside the south rail. The bolt through the journal caught some part of his clothing and dragged his body for a distance of practically fifteen feet, when the body became detached from the cars in their backward movement. The cars finally stopping about two car lengths east of the body.

AUTHORITIES.

In this line of cases the rule is:

> "That it is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence."
>
> "If the circumstantial evidence in any case furnishes a *reasonable basis* for the inference by the jury of the ultimate fact, that the alleged negligence was the cause of the injury complained of it is sufficient proof of causal connection to support the verdict."

Lillistrom vs. N. P. Ry. Co., 53 Minn. 464.

Olson vs. G. N. Ry., 68 Minn. 155.

Moores vs. N. P. Ry., 108 Minn. 100.

Murphy vs. Twin City Taxi Co., 122 Minn. 363.

Denerce vs. Soo Ry., 122 Minn. 171.

Mitton vs. Craghill Co., 124 Minn. 165.

Crandall vs. G. N. Ry., 127 Minn. 498.

Diebel vs. Walpert-Droms, 129 Minn. 177.

Fitzgerald vs. Armour & Co., 129 Minn. 81.

Outzelt vs. C. B. & Q. Ry., 150 Minn. 398.

Ardell vs. G. N. Ry., 189 N. W. Rept. 939.

Dushaw vs. G. N. Ry., 195 N. W. Rept. 893.

McIntosh vs. G. N. Ry., 151 Minn. 527.

See also

Chostaw, Okl. and G. Ry. Co. vs. McDade, 191 U. S. 64.

Myers vs. Pittsburg Coal Co., 233 U. S. 184.

Union Pac. Ry. Co. vs. Huxell, 245 U. S. 535.

Gray vs. Davis Dir. Genl., 294 Fed. 58.

Taber vs. Davis Dir. Genl., 280 Fed. 612.

Sioux City R. R. Co. vs. Stout 17 Wall. 657.

In the case of Moores vs. N. P. Ry., Supra, the Court said:

> "Theorize as we may on the subject of proximate cause, it is in its last analysis a question of good common sense to be solved by a practical consideration of the evidence in each particular case. If the evidence in any case leaves the question whether the negligence of the defendant was the cause of the injury a matter of conjecture the defendant is entitled to a directed verdict. The plaintiff, however, is not required to prove the causal connection between the negligence and the injury by direct evidence but the evidence must be something more than consistent with the plaintiff's theory of how the accident occurred. If the circumstantial evidence in any case furnishes a reasonable basis for the *inference* by the jury of the ultimate fact, that the alleged negligence was the cause of the injury complained of it is sufficient proof of causal connection to support the verdict."

Dushaw vs. G. N., Supra, the Court said:

> "Of course, the jury were not at liberty to conjecture how the accident happened. Plaintiff must show causal connection between the negligence alleged, and the injuries suffered. But plaintiff was not required to establish by direct evidence. If the circumstances furnished a basis not only for the inference that the accident may have happened as alleged, but also for the inference that it did so happen, and the Court is of the opinion that it did, the verdict would not rest on mere conjecture."

In the case of Union Pac. Ry. Co. vs. Huxoll, Supra, this court said:

> "The oral argument of plaintiff in error was practically confined to the proposition that the trial court committed reversible error in submitting the question to the jury for the reason that even if it be assumed that the power brake was not in order, there was no substantial evidence in the case, that this failure contributed in whole or in part to cause the death of Huxoll."
>
> "Demonstration is not required in such a case as we have here, but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence."

Counsel for petitioner on page 17 of their brief cite, Pittsburg Coal Co. vs. Myers, 203 Fed 221, in support of their contention that the evidence in this case leaves the cause of Coogan's death speculative and conjectural. That is the only Federal case cited by them, where its facts, if its law, were sound, would entitle it to consideration in this case. That case, however, on appeal was reversed by this Court.

Myers vs. Pittsburg Coal Co., 233 U. S. 184. In reversing the Circuit Court of Appeals, after quoting from the opinion of the Circuit Court quite extensively, Justice Day speaking for this Court said:

> "This question however, was submitted to the jury and found against the defendant in

the trial court. Unless the testimony was such that no recovery can be had upon the facts shown, *in any view which can be properly taken of them*, the verdict and judgment of the District Court must be affirmed.

"That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law, that there was no evidence to show that Myers came to his death by negligence of the defendant in one or more ways charged in the petition; *considering the testimony as it must be considered* in determining questions of this character in Appellate Court, *in the most favorable aspect to plaintiff below* we think the jury might well have found in view of the place where body of Myers was found near the wire, with his cap gone from his head, that he came in contact with the wire, and was thrown to the ground, and that he survived from the contact with the wire, carrying the voltage which it did, and while in this position was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry, or in the motor car."

"We think reasonable men considering the testimony adduced might well have come to this conclusion, and that it was error in the Appellate Court to set aside the verdict for the entire absence of testimony upon this subject. In our opinion the trial court properly left the question to the jury upon testimony which, when fairly considered might sustain the verdict."

Counsel for petitioner cites Patton vs. Texas & P. Ry. Co., 179 U. S. 658, and Looney, Admx., etc. vs. Metropolitan Railroad Co., 200 U. S. 480, as the leading cases in support of its contention. Neither one of these cases are in point. In the Patton case the Court after stating the distinction in the rule between passenger and employe, also stated that the fact of an accident carried with it no presumption of negligence, and further stated that where the testimony shows the cause of an accident uncertain, and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess which of the causes produced the accident, but qualifies that by saying, "where there is no satisfactory foundation in the testimony for that conclusion." In the Patton case there was no evidence tending to point to one of the causes for which the master would be responsible to the exclusion of any other.

In the Looney case, Looney was killed while in removing what was called a plow from beneath the street car, which was used through a slot in the track to connect with the underground current, when used over the Metropolitan system, and to replace the plow when removed with "wires od leads" to connect with the overhead, or trolley system, when the car was being operated over the Great Falls system. The evidence was conclusive in that case that the plow had been removed, and that Looney was engaged in attaching the wires or

leads beneath the car at the time he was killed. This Court said in substance:

> Granting therefore, the conductor was negligent, one of two things was necessary to cause the accident; first, a leak in the insulation, or, second, the deceased touching the uninsulated ends of the leads. For the first the company would be liable, for the second, not.

The ends of the leads had to be uninsulated, and there was no evidence of any defect in the leads or any leak in the insulation, or that leaks were likely to occur, or the amount or degree of inspection necessary to discover them, or failure of inspection. It seems the case was tried and argued in this Court on the theory that Looney was killed while removing plow, but that the evidence was positive to the contrary, that he was killed after the plow had been removed, and while attaching the wires or leads.

DECEDENT DID NOT ASSUME THE RISK AS A MATTER OF LAW.

The air pipe line in this yard extended along track No. 1 outside the rail for perhaps 800 to 1,000 feet. It was an inch and three-quarter pipe. It was fastened to the top of the ties by clamps or spikes about twelve inches out from the south rail, and when in normal condition, leaving no space between the ties and the pipe.

The evidence shows and it was admitted by defendant's witnesses that there is space of at least fifteen feet in this air pipe line, which had been in

a defective condition for over possibly four or five months, clamps and spikes torn away. The pipe bent in at least three or four inches, and up, leaving a space of three and one-half or four inches between the ties and the pipe line.

Coogan had been on this run on Train 91 from Austin to Farmington and on Train 92 from Farmington to Austin some two or three months before the accident. It does not appear from the evidence that Train 91 was ever put away on track 1. Train 92 was sometimes made up on the main track, which is the first track north of track 1, sometimes made up on track 1, sometimes on track 2, and sometimes on track 3, but there is no evidence as to how many times it had been made up on track 1, or that Coogan had ever had occasion to couple air in the immediate vicinity of the defect in the pipe line.

It would be going far to say that even if Coogan knew or should have known of this defect in the pipe line, that he should, as a matter of fact have appreciated the risk and danger of his foot slipping under the pipe, and being caught in the manner he was.

Chicago, R. I. & Pacific Ry Co. vs. Brown, 229 U. S. 317.

Tex. & Pac. Ry. Co. vs. Harvey, 228 U. S. 319.

Tex. & Pac. Ry. Co. vs. Swearingen, 196 U. S. 57.

Gila Valley R. Co. vs. Hall, 232 U. S. 94.

The case of Southern Pac. Co. vs. Berkshire, 254 U. S. 415, cited by the petitioner is not in point or authority under the facts of this case, this Court having expressly stated in its opinion in the Berkshire case that it was confining itself, "*to the case of postal cranes.*"

RULE IN THE "KING" CASE.

In the instant case there is no question of the interpretation of any Federal Act, or the definition of legal principles in its application. No point is made or could be made as to any instruction given by the trial court. The only questions presented are, first, was there any evidence with the proper and legitimate inferences to be drawn therefrom which furnished a reasonable basis for the finding of causal connection between the defendant's admitted negligence and Coogan's death. And, second: Incidently the question of the assumption of risk.

This case comes within the rule announced by this Court in:

Chicago June. Ry. Co. vs. King, 222 U. S. 222.

and followed in:

Chicago, R. I. & Pac. Ry. Co. vs. Brown, 229 U. S. 317.

G. N. Ry. Co. vs. Knapp, 240 U. S. 464.

Seaboard Air Line Ry. Co. vs. Padgett, 236 U. S. 668.

Southern Ry. Co. vs. Gadd, 233 U. S. 572.

Baltimore & Pac. Ry. Co. vs. Whitacre, 240 U. S. 169.

Seaboard Air Line Co. vs. Kenney, 36 Sup. Ct. Rep. 458.

Lewisville & N. Ry. Co. vs. Stewart, 36 Sup. Ct. Rep. 586.

In the case of Chicago June. Ry. Co. vs. King, Supra, this Court said:

> "That although we have jurisdiction to review because the cause of action as stated in the pleadings rested upon the safety appliance law, the questions now presented are of a character which ordinarily it was the purpose of the judiciary act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals." * * *
>
> "We do not think we are called upon to scrutinize the entire record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusions of the Courts below, as to the tendencies of the proof."

Chicago, R. I. & Pac. Ry. vs. Brown, Supra, this Court said:

> "The trial Court and the Circuit Court of Appeals considering the evidence confirmed the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed but such as must be pronounced to be without foundation as a matter of law."

G. N. Ry. Co. vs. Knapp Supra. This Court said the question presented:

> "simply involves an appreciation of all the facts and the admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The State Courts—Trial and Appellate, held that there were. Having regard to the appropriate exercise of the judisdiction of this Court, we should not disturb the decision on a question of this sort unless error is palpable."

Southern Ry. Co. vs. Gadd, Supra. This Court said:

> "The questions that require to be decided merely involve considerations of general law depending in no sense upon the particular significance of the employers liability act. * * * Under these considerations it is apparent that the case is absolutely controlled by the 'King case,' and we therefore content ourselves with saying that as after an adequate examination of the record we find no ground whatever, affording a clear conviction that error was committed."

Baltimore & Chi. R. R. Co., vs. Whitacre, Supra, this Court said:

> "The defendant requested peremptory instruction on the ground that there was not sufficient evidence to entitle plaintiff to recover. The Appellate Court was unanimous in holding that the trial Court had properly left the case to the jury. No clear and palpa-

ble error is shown which would justify us in disturbing that ruling."

Lewisville & Nashville Ry. Co. vs. Stewart, Supra, this Court said:

> "The railroad company contends at some length that the case should have been taken from the jury by a direction of a verdict in its favor. As the opinion of both Courts below, and the jury were against it, and as we agree with their judgment, we should not discuss this assignment of error at length. * * * Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong."

When we consider that this was a unanimous and not a Five-Sixths verdict, that after due consideration of the evidence and the law, not only at the close of the testimony but also on a motion for judgment non obstante, the verdict was approvided by the trial Court, and that on appeal the action of the trial Court was affirmed by the unanimous vote of the Appellate Court, also;

That not a Federal case cited by Petitioner on its facts is in point or authority in this case. That the rule as expressed by this Court in this class of cases, is found in Myers vs. Pittsburg Coal Company, 233 U. S. 184, and similar cases, and not in Pittsburg Coal Company vs. Myers, 203 Fed. 221, and the further fact that the rule in the "King case" consistently followed by this Court is applic-

able to the situation in this case. It would seem that but one conclusion could be reached, and that is that the petition for the Writ of Certiorari is not in good faith; that it is without merit and for delay only.

We therefore, respectfully submit that the petition for Writ of Certiorari should be denied with a penalty by way of damages under the rules of this Court, together with legal interest and costs.

Respectfully submitted,

LYLE PETTIJOHN,
427 Metropolitan Bank Bldg.,
St. Paul, Minnesota,
Attorney for Respondent.
T. D. SHEEHAN,
H. J. GOODWIN,
Metropolitan Bank Bldg.,
St. Paul, Minnesota,
Of Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM 1925

No. 268

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED,
Respondent,

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

STATEMENT OF CASE.

The Respondent, as Special Administratrix of William Coogan, deceased, brought this action in the District Court of Dakota County, Minnesota, on behalf of herself and her six minor children to recover from the petitioner for the wrongful death of William Coogan, the husband and father.

The Respondent had a verdict in the trial court for $13,500.00. The Petitioner then moved for judgment notwithstanding the verdict only, which was denied, there being no motion for a new trial.

The Petitioner then appealed from the judgment entered upon the verdict to the Supreme Court of the State of Minnesota, where the judgment of the lower court was affirmed and judgment entered in the Supreme Court of the State of

Minnesota on the 13th day of November, 1924, in Respondent's favor and against Petitioner, in the sum of $14,363.29.

STATEMENT OF FACTS.

William Coogan, the deceased husband of Respondent, had been in the employ of the defendant for over fourteen years. On the 14th day of July, 1923, he came to his death while employed as a railway brakeman on what is known as defendant's freight train 92. The run of this train was from Farmington to Austin, Minnesota. Train 92 was an interstate train and at the time that Coogan was killed, was engaged in interstate commerce.

Train 92 was made up in the Yards at Farmington, Minnesota, a short time after 7 o'clock A. M. on the day in question by what is known as the switch crew, of which John Marshall was conductor, and one Dubke and Odekirk were brakemen. (Record 13).

The first movement in the making up of Train 92 was to kick the caboose belonging to this train from the lead on Track 1 in an easterly direction, the tracks at that place running easterly and westerly. Coogan rode the caboose in on Track 1 and stopped it by applying the hand brakes. (Record 13).

The next movement in the making up of this train was for the switch engine to couple on to two cars to bring them to the lead track, and while in motion cut them from the engine and kick them down on track one. Dubke rode the cars in as they were moving back in the easterly direction towards the caboose, riding the front car, and controlling their movement by hand brakes, allowing them to couple automatically to the caboose. (Record 13-22-33).

The next movement in the making up of the train was for the switch engine to couple on to nine or possibly ten cars, taking them to the lead, cutting them off from the engine, kicking them back on Track 1, in the same manner as the former cut, Dubke riding them in and allowing them to couple to the first cut of two cars. (Record 33-34).

The next movement in the making up of this train was for the switch engine to couple on to either three or four cars and move with the cars back on to Track 1 with the engine attached until they coupled on to the cars last put in. This was the final cut and constituted the entire train. (Record 34).

After this last cut of four cars had been coupled to the train they stopped the engine to see if the automatic coupling had been made. Having found it had, they found it necessary to move the entire train back in order to clear the switch, and they moved the entire string of cars back at that time in an easterly direction in the neighborhood of two car lengths. (Record 34).

They then uncoupled the switch engine from the train and the road engine was immediately coupled thereto, and when the air hose was coupled between the engine and the first car, the engineer immediately attempted to pump up the air train line, but was unable to do so for the reason that the air coupling had not been made between the last four cars put in and the second cut of ten cars put in the train. This air coupling was then made by Dubke, and when made, it was found that the air was then escaping at the rear end of the train, the air hose not having been coupled between the caboose and the car attached thereto. Dubke then started back towards the rear end of the train and when some distance back discovered the body of Coogan. (Rec-

ord 34-35-36).

It appears that it was the duty of Coogan to couple the air on this freight train and that with the exception of the coupling between the caboose and the next car thereto, the couplings had all been made prior to the accident except the coupling between the last four cars put in and the ten cars above referred to. (Record 9-10-25-41).

Coogan's body was found near the west end of the second car from the caboose. His body was lying parallel with the tracks, outside the south rail and on or just at the end of the ties. (Record 11-18-36).

The kicked up condition of the ground and the blood found just opposite the south rail of Track 1, indicated that Coogan's body had been dragged a distance of about 15 feet. (Record 38).

The rear wheel on the south side of the car coupled to the caboose had blood on it. There was no blood on any other part of the train. (Record 11-18).

A piece of Coogan's clothing was found on the bolt passing through the journal box, holding the anchor bar on the journal box of the rear wheel of the car coupled to the caboose, being the same wheel on which blood was found. (Record 19-20-31-36).

Coogan's hat, his false teeth, part of his tongue and flesh from his face was found between the rails of the track; some of them close to the south rail about 15 feet west of where his body was found. (Record 19-20-26-27).

The entire lower part of his face was gone; his left leg and left arm were badly mangled, so that the undertaker had to put casts on them. The little finger of his left hand was crushed. (Record 20-27-31).

Immediately south of the south rail of Track 1, there was an air pipe line on top of the ties and extending along the track for a distance perhaps of 800 feet. This air pipe line when in normal condition was fastened to the ties by clamps or spikes about 12 inches out from the south rail of the track and close to the ties, leaving no space between the pipe line and the ties to which it was fastened, and this air pipe at a point about 15 feet west of where the body was found was in a defective condition and had been for some period of time, and that for a distance of at least 15 feet the fastenings had been torn loose and the air pipe line bent inward and up from the ties, leaving a space of about 3½ or 4 inches between the ties and the air pipe line, and bent in toward the rail possibly 3 or 4 inches. (Record 39-40-41).

Defendant's Exhibit G, a picture of the front end of the rear truck of car three or the third car from the caboose was taken for the purpose of showing where the hat was found, estimated to be about 15 feet west of the body. (Record 71-72).

It was also shown that a man stepping in between the cars from the south side to couple air on a train standing as this train was, that the natural position for him to take would be to step inside the south rail with his right foot, leaving his left foot immediately outside of the rail and inside of the pipe line. (Record 41-42).

There was introduced in evidence the shoe worn by the deceased, at the time of the accident, showing a very marked rounding depression on the counter of the left shoe on the outside of the shoe running parallel with the sole of the shoe and just above the heel. That the shoes were in the same condition at the time they were taken from the body of the deceased as when offered in evidence, except that the

depression in the counter of the shoe wasn't so marked to the eye at the time of the trial, the outside leather covering the counter of the shoe having appeared to have ironed itself out to some extent. (Record 28, 29, 30, 52, 53).

The standard guage of the railroad track is 4 feet 8½ inches, and the width of the box cars such as were used on this train, 9 feet. And the length of the cars 33 to 40 feet (Record 38-39).

POINTS AND AUTHORITIES.

It will be noticed that in this case there was no motion for a new trial made in the trial court, but only a motion for judgment notwithstanding the verdict. Under these conditions the rule in our State is as expressed in the case of North West Marble Co. vs. Williams, 128 Minnesota 414:

> "The question is whether there is any competent evidence reasonably tending to support the verdict. Every intendment will be indulged in favor of the verdict and judgment will only be granted when the evidence is conclusive against the verdict."

And again in Fairmont Gas Co. vs. Crouch, 133 Minn. 167, our court said:

> "Judgment notwithstanding the verdict should be granted only where it clearly appears that the cause of action sought to be established does not in point of substance constitute a right of recovery although the evidence is insufficient to sustain the verdict. Still if it appears probable that plaintiff has a good cause of action on the merits and that the defects in the evidence *may* be supplied on another trial judgment notwithstanding the verdict should not be given. Larson v. G. N. Ry. 116, Minn. 337."

What *facts* were established by the evidence in this case were for the Jury. It is equally true that if the *inference* to be drawn from the facts proven are not certain and con-

clusive then the *inferences* proper to be drawn from such facts are for the jury.

This rule is well expressed by the late Justice Mitchell of our Supreme Court in a case that has frequently been cited by our court in this class of cases, in Abbette vs. Milwaukee, 30 Minn. 482:

> "Negligence is ordinarily a question for the jury. It is always so where the evidence on a material point is conflicting or where the facts being undisputed different minds might reasonably draw different conclusions from them. Negligence cannot be conclusively established as a matter of law upon a state of facts beyond which fair minded men of ordinary intelligence may differ as to the inference to be drawn; and when the question of negligence arises upon even a conceded state of facts from which reasonably minded men might arrive at different conclusions it must be submitted to the Jury, and if the inference to be drawn from the evidence was not certain or incontrovertible the question of negligence cannot be passed upon by the court. The evidential facts may all be admitted and yet the question of negligence not be a question for the court; for in such cases this is the main fact, the existence or non-existence of which is to be inferred from the other facts."
>
> (See also N. P. Ry. Co. vs. Egeland, 163, U. S. 93; Texas & Pac. Ry. Co. vs. Gentry, 163 U. S. 353; Sioux City & P. Ry. vs. Stout, 17 Wall, 657.

This case was tried upon and it is the theory of Respondent, that after the last cut of four cars were coupled to the train with the switch engine attached and stopped to see if the automatic coupling was properly made, Coogan having made all the other air couplings then stepped in between the caboose and the rear car to make the last air coupling, with his right foot inside the rail and his left foot outside the rail between the south rail and the air pipe line on the ties, and when in a stooping position to reach the air

hose for the purpose of coupling the same his left foot slipped backward and under the air pipe line, and before having had time to couple the air the cars started backward in the movement being made to shove them into the clear, and when he attempted to straighten up he found his foot caught beneath the air pipe line and couldn't free the same and was forced backward by the cars, fell to the ground outside the south rail, receiving the injuries causing his death.

While it is not necessary for defendant or petitioner to show the manner in which the accident happened, we call attention to the fact that there is not a suggestion or intimation in the evidence of a fact disclosed by the evidence from which it could be inferred that the accident could have happened in any other manner than the one claimed by the Respondent.

COOGAN WAS BETWEEN THE CABOOSE AND THE FIRST CAR AT THE TIME OF THE ACCIDENT.

The evidence in this case furnishes a reasonable basis for the finding that at the time of the accident Coogan was between the caboose and the car coupled thereto in an attempt to couple the air at that point. The air on this train except the last cut of four cars had all been coupled before the accident with the exception of that between the caboose and the car coupled thereto. The air coupling between the second and third cars from the caboose, and such other air couplings as were necessary to be made in other places in this string of cars were made by Coogan during the time this train was being made up. It was no part of the duty of any member of the switch crew to couple this air. While the train was being made up there was no member of the

road crew or any other person near this train except Coogan. Delehanty the other brakeman of the road crew was in the west end of the Yard down by the lead, and Jeffers, the conductor of the road crew was also in the west end of the yard. Coogan was the rear brakeman, so the other members of the road crew had nothing to do with this air coupling that had been made. It was Coogan's duty to couple this air. This fact was not disputed in the trial court or in the supreme court of the State, and it is suggested for the first time by petitioner in its brief in this court, basing it upon the answer of Dubke when speaking about the coupling made by him after the road engine had been put on and they attempted to pump up the air, referring to the coupling made between the last cut of three or four cars and the former cut of ten. That Coogan was engaged in attempting to make this last coupling between the caboose and the first car coupled thereto there can be no question. That he was at the opening between the caboose and the car coupled thereto is shown conclusively by the blood on the rear wheel of this car coupled to the caboose and by parts of his clothing being found on the bolt through the oil box journal of the same wheel. There was no blood on any other part of the train. It being his duty to make this coupling and the fact that he had made all the other couplings of the air with the exception hereinbefore referred to, and it being shown that he was at this point, it is but a fair inference that he was engaged in the performance of his duty.

POSITION COOGAN WOULD TAKE TO COUPLE AIR.

The evidence furnished a reasonable basis for the Jury to find that the natural position for Coogan to take in making this coupling was with his right foot inside the rail and his left foot outside the rail and inside the air pipe line, and

that just before the train started moving backward to pull the cars in clear, and while in a stooping position his left foot slipped beneath the air pipe line and became caught. Mr. Odekirk, who had years of experience in that line of work testified that this would be the natural position for him to take, so that he would be facing the engine and that it is customary for men when working around trains of that kind to work facing the engine or front of the train. The petitioner and defendant called Mr. Lieb, Mr. Palmer and a Mr. Hemsey. None of them had ever had any experience whatever in coupling air hose. They testified to the fact that the natural position for a brakeman to take in attempting such a coupling would be to step in with his left foot inside the rail. But the defendant did not call or ask any of its two trainmen as to the proper manner of coupling this air.

THE OPENING BETWEEN THE CABOOSE AND THE CAR COUPLED THERETO WAS OPPOSITE THE DEFECTIVE PIPE LINE.

The evidence furnished a reasonable basis for the Jury to find that the opening between the caboose and the car coupled thereto before they started to shove the train into clear, was opposite the defective condition in the air pipe line when Coogan stepped into make the coupling, and while in a stooping position his left foot became caught, slipping back under the air pipe line where there was a space of about 3½ or 4 inches between the pipe and the ties, so that the cars in starting backward forced him to the ground outside the rail and inside the pipe line, causing the injuries resulting in his death. The blood on the rear wheel of the car coupled to the caboose and the part of his clothing on the bolt through the journal of the same wheel show

conclusively that Coogan was at this opening between the caboose and the car. His body was found approximately at the west end or front end of the second car from the caboose. The blood and kicked up condition of the ground outside the south rail showed that his body had been dragged a distance of at least 15 feet. His hat was found in the neighborhood of 15 feet west of the body and beneath the rear trucks of the third car from the caboose; his teeth and tongue and pieces of flesh nearby just inside the south rail. The defective condition of the air pipe line was about 15 feet west of the body, conclusively showing that the opening between the caboose and the first car were opposite the defective condition in the air pipe line when they started to shove the train into clear. Then take into consideration that after Coogan had been forced to the ground outside the south rail he might have been carried a short distance without any evidence of dragging. The mark, or more properly speaking, the rounding depression in the counter of his left shoe on the outside of his shoe and running parallel with the sole of his shoe is convincing if not conclusive evidence of how it was caught. In this connection I wish to note that the undertaker testified that when he delivered Coogan's shoes to one of the attorneys of the Respondent, his attention was called to a rounding depression in the counter of this shoe, and also to the effect that he noticed no difference in the condition of the shoes at that time from what they were when removed from the body. The nature of Coogan's injuries themselves are strongly corroborative of the manner in which he was caught and the position in which he was when the injuries occurred. It doesn't appear that the right side of his body was injured at all to speak of. With his foot beneath the pipe he could not free the same until he was forced back by

the car so that his body became practically parallel with the pipe line and close to the ground. This would practically force his body in the space between the air pipe line and the rail with the knee part of his leg over the south rail in a bent position. The undertaker testified that his left leg was badly mashed, as he expressed it; that he had to put a cast on it. The wheel would next reach Coogan's left arm. It appears his arm was also caught by this wheel and so badly mashed that a cast had to be placed upon it. The little finger on the left hand was mashed and crushed by the wheel. The lower part of his face was mashed and gone leaving part of his tongue, false teeth and flesh just inside the south rail. The bolt through the journal box caught some part of his clothing and dragged his body for a distance of practically 15 feet when the body became detached from the cars in their backward movement, the cars finally stopping about two car lengths east of the body.

We feel that in a case of this character, based upon circumstantial evidence that the test should be not as to whether some isolated fact, in and of itself alone establishes some particular point, but does the evidence as a whole furnish a reasonable basis for the belief that the alleged negligence was the cause of the accident complained of.

Or as expressed by this court:

> "Circumstances altogether inconclusive, if, separately considered; may by their number and joint operation be sufficient to constitute conclusive proof."

AUTHORITIES.

In this line of cases I take the rule to be, that it is not necessary in any action, civil or criminal that the material facts should be established by direct evidence.

"If the circumstantial evidence in any case furnishes a reasonable basis for the inference by the Jury of the ultimate fact that the alleged negligence was the cause of the injury complained of, it is sufficient proof of causal connection to support the verdict."

Lillstrom v. N. P. Ry. Co. 53 Minn. 464;
Olson v. G. N. Ry. Co. 68 Minn. 155;
Mores v. N. P. Ry. Co. 108 Minn. 100;
Murphy v. Twin City Taxi Cab Co. 122 Minn. 363.
De Merce v. Soo, 122 Minn. 171;
Miatton v. Craghill Co. 124 Minn. 165;
Crandall v. G. N. Ry. 127 Minn. 498;
Fitzgerald v. Armour, 129 Minn. 81;
Outzelt v. C. B. & Q., 150 Minn. 398;
DuShaw v. G. N. Ry. Co., 195 NW Rep. 893;
McIntosh v. G. N. Ry., 151 Minn. 527.

See also:

Choctaw, Okl. & G. Ry. v. McDade, 191 U. S. 64;
Myers v. Pittsburgh Coal Co., 233 U. S. 184;
Union Pacific Ry. Co. v. Huxoll, 245 U. S. 534;
Gray v. Davis Dir. Gen'l., 294 Fed. 58;
Tabor v. Davis, Dir. Gen'l., 280 Fed. 612;
Sioux City Ry. Co. v. Stout, 17 Wall. 657;
Maraude v. Texas & Pac. Ry. Co., 184 U. S. 173.

In the case of Union Pacific Ry. Co. v. Huxoll, Supra, this Court said:

"The oral argument of the plaintiff in error was practically confined to the proposition that the trial court committed reversible error in submitting the question to the jury for the reason that even if it did assume that the power brake wasn't in order there was no substantial evidence in the case that this failure contributed in whole or in part to cause the death of Huxoll."

> "Demonstration is not required in such a case as we have here, but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence."

Counsel for petitioner, in their Brief cite Pittsburgh Coal Co. v. Myers, 203 Fed. 221. This case on appeal to this court was reversed.

In Myers v. Pittsburgh Coal Co., 233, U. S. 184, in reviewing the Circuit Court of Appeals, after quoting quite extensively from the opinion of the Circuit Court of Appeals, Justice Day speaking for this Court said:

> "This question however was submitted to the Jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown *in any view which can be properly taken of them* the verdict and judgment of the district court must be affirmed."

> "That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence to show that Myers came to his death by negligence of the defendant in one or more ways charged in the petition. *Considering the testimony as it must be considered in determining questions of this character in the appellate court in the most favorable aspect to plaintiff below,* we think the jury might well have found in view of the place where the body of Myers was found near the wire, with his cap gone from his head, that he came in contact with the wire and was thrown to the ground and that he survived from the contact with the wire carrying the voltage which it did, and while in this position was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car."

"We think reasonable men considering the testimony adduced might well have come to this conclusion and that it was error in the appellate court to set aside the verdict for the entire absence of testimony upon this subject. In our opinion the trial court properly left the question to the Jury upon testimony which, when fairly considered might sustain the verdict." (Italics ours).

In the case of Mores vs. N. P. Ry. Co., Supra, the court said:

"Theorize as we may on the subject of proximate cause, it is in its last analysis a question of good common sense to be solved by a practical consideration of the evidence in each particular case. If the evidence in any case leaves the question whether the negligence of the defendant was the cause of the injury a matter of conjecture, the defendant is entitled to a directed verdict. The plaintiff, however, is not required to prove the causal connection between the negligence and the injury by direct evidence, but the evidence must be something more than consistent with plaintiff's theory of how the accident occurred. If the circumstantial evidence in any case furnishes a reasonable basis for the inference by the jury of the ultimate fact that the alleged negligence was the cause of the injury complained of it is sufficient proof of causal connection to support the verdict."

In Dushaw vs. G. N. Ry. Supra, the court said:

"Of course the jury were not at liberty to conjecture how the accident happened. Plaintiff must show casual connection between the negligence alleged and the injuries suffered, but plaintiff wasn't required to establish by direct evidence if the circumstances furnished a basis not only for the inference that the accident may have happened as alleged, but also from the inference that it did so happen, and the court is of the opinion that if it did the verdict would not rest upon mere conjecture."

In speaking of inferences to be drawn from circumstantial evidence the court, in the case of Cheasepeake & Ohio Ry. vs. Ware, 95 S. E. 183, said:

> "Referring to the rule that an inference cannot be drawn from an inference or presumption, McCabe, J., in delivering the opinion of the court in Hinshaw vs. State, 147 Ind. 334 at page 363 says: 'There is an important exception to that rule, however. A *fact* in the nature of an inference may itself be taken as the basis of a new inference whether intermediate or final, provided the first inference has the required basis of *a proved* fact."

The court further says:

> "If the inference or presumption is based upon such evidence that it may be regarded as a *fact proved* in the case, then, although the evidence upon which it is based may be circumstantial evidence such inference or presumption of fact may itself form the basis for another inference of fact equally as if it had been proved by direct evidence."

Starkie on Evidence, Section 57 says: in substance:

> Since facts in issue may be proved by circumstantial evidence as well as by direct or testimonial evidence and every fact proved by circumstantial evidence is but an inference from such evidence, that where a fact is proved in a case as a fact although by inference from substantial evidence, such a fact may itself be taken as the basis for a new inference of fact.

Counsel for petitioner also cites the cases of Patton v. Tex. & Pac. Ry. Co. 179 U. S. 658; and Looney, Administratrix vs. Metropolitan Ry. Co., 200 U. S. 480; as the leading cases in support of its contention.

It seems to us that under the facts in these cases neither one of them are in point or authority in this case. In the

Patton case the court after stating the distinction in the rule between passenger and employe, also stated that the facts of an accident carried with it no presumption of negligence, and further stated that where the testimony shows the cause of an accident uncertain and shows that any one of half a dozen things may have brought about the injury for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess which of the causes produced the accident, and qualifies this statement by saying:

> "Where there is no satisfactory foundation in the testimony for the conclusion."

In the Patton case there was no evidence tending to point to any one particular cause for which the master would be responsible.

In the Looney case, Looney was killed in removing what was called a plow from beneath the street car which was used through a slot in the track to connect with the underground current when used over the Metropolitan System, and to replace the plow when removed with wires for leads to connect with the overhead or trolley system when the car was being operated over the Great Falls System. The evidence was conclusive in that case that the plow had been removed prior to the accident and that Looney was engaged in attaching the wires or leads beneath the car at the time he was killed. This court said in substance:

> Granting therefore the conductor was negligent one of two things was necessary to cause the accident; first, a leak in insulation, or second, the deceased touching the uninsulated ends of the leads. For the first the company would be liable; for the second, not.
>
> The end of the leads had to be uninsulated and there was no evidence of any defect in the leads or any leak in the insulation or that leaks were likely

to occur, or the amount or degree of inspection necessary to discover them or failure of an inspection.

It seems the case was tried and argued in the Supreme Court on the theory that Looney was killed while removing the plow, but the evidence was positive to the contrary, and that he was killed after the plow had been removed and while attaching the wires or leads.

DECEDENT DID NOT ASSUME THE RISK AS A MATTER OF LAW.

The air pipe line in this yard extended along Track No. 1 outside the rail for perhaps 800 to 1000 feet; it was a 1¾ inch pipe; it was fastened to the top of the ties by clamps or spikes about 12 inches out from the south rail and when in normal condition leaving no space between the ties and the pipe.

The evidence shows and it was admitted by defendant's witnesses that there is a space of at least 15 feet in this air pipe line which had been in a defective condition for possibly 4 or 5 months, clamps and spikes torn away, the pipe bent in and up leaving a space of 3½ or 4 inches between the ties and the pipe line.

Coogan had been on this run on Train 91 from Austin to Farmington and on Train 92 from Farmington to Austin, in the neighborhood of two months before the accident. It doesn't appear from the evidence that Train 91 was ever put away on Track 1. Train 92 was sometimes made up on the main line track, which is north of Track 1, sometimes made up on Track 1, sometimes made up on Track 2, and other times on Track 3; but there is no evidence as to how many times it had been made up on Track 1, or that Coogan ever had occasion to couple air in the immediate vicinity of

the defect in this pipe line. Under this evidence it would be going far to say that even if Coogan knew or should have known of this defect, that he should as a matter of fact have appreciated the risk and danger of his foot slipping under the pipe and being caught in the manner he was when engaged in attempting to make this coupling.

C. R. I. & P. Ry. Co. vs. Brown, 229 U. S. 317;
Tex. & Pac. Ry. Co. vs. Harvey, 228 U. S. 319;
Tex. & Pac. Ry. Co. vs. Swearingen, 196 U. S. 57;
Gila Valley R. Co. vs. Hall, 232 U. S. 94.

The case of So. Pac. Co. vs. Berkshire, 254, U. S. 415, cited by the Petitioner is not in point or authority under the facts of this case, this court having expressly stated in its opinion in the Berkshire case, in passing upon the assumption of risk in that case, that it was confining itself "to the case of Postal Cranes."

RULE IN THE KING CASE.

In the instant case there is no question of the interpretation of any Federal Act or the definition of legal principals in its application. No point is made or could be made as to any instruction given by the trial court. The only question presented was first: "Was there any evidence with the proper and legitimate inference to be drawn therefrom which furnished a reasonable basis for the finding of causal connection between the defendant's admitted negligence and Coogan's death? And second, incidentally the question of the assumption of risk. This case comes within the rule announced by this court in Chicago Jct. Ry. Co. vs. King, 222 U. S. 222, and followed in Chicago R. I. & P. Ry. Co. vs. Brown, 229 U. S. 317; G. N. Ry. Co. vs. Knapp, 240 U. S. 464; Seaboard Air Line Co. vs. Padgett, 236 U. S. 668;

So. Ry. Co. vs. Gadd., 233 U. S. 572; Baltimore & Ohio Ry. Co. vs. Whitacre, 240 U. S. 169; Seaboard Air Line vs. Kenney, 36 Sup. Ct. Rep. 458; Louisville & Nashville Ry. Co. vs. Stewart, 36 Sup. Ct. Rep. 586.

In the King case this court said:

> "That although we have jurisdiction of review because the cause of action as stated in the pleadings rested upon the safety appliance law, the questions now presented are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals.

"We do not think we are called upon to scrutinize the entire record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw therefrom inferences which may possibly conflict with the conclusions of the courts below as to the tendencies of the proof."

In C. R. I. & P. Ry. Co. vs. Brown, Supra, this court said:

> "The trial court and the circuit court of appeals considering the evidence confirm the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed, but such as must be pronounced to be without foundation as a matter of law."

In Baltimore & Ohio Ry. Co. vs. Whitacre, Supra, this court said:

> "The defendant requested peremptory instructions on the ground that there was not sufficient evidence to entitle plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No clear and palpable error is shown which would justify us in disturbing that ruling."

In Louisville v. Nashville Ry. Co. vs. Stewart, Supra, this court said:

> "The railroad company contends at some length that the case should have been taken from the jury by direction of a verdict in its favor. As the opinion of both courts below and the jury were against it, and as we agree with their judgment we haven't discussed this assignment of error at length. Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong."

In this case the verdict was not a five-sixths verdict, but was the verdict of the entire jury. After due consideration of the evidence and the law, not only at the close of the testimony but also on a motion for judgment non-obstante, the verdict was approved by the trial court and on appeal the action of the trial court was affirmed by the unanimous vote of the Supreme Court.

The rule as expressed by this court in this class of cases found in Myers v. Pittsburgh Coal Co. 233, U. S. 184 and similar cases is the rule applicable to the instant case and not the rule as stated in Pittsburgh Coal Co. vs. Myers, 203 Federal.

And when we further consider the fact that the rule as stated in the King case consistently followed by this court is entirely applicable to the situation in this case it would seem to us that the judgment of the Supreme Court of the State of Minnesota should be affirmed.

We therefore respectfully submit that the judgment of the Supreme Court of Minnesota be affirmed, with legal interest and costs.

Respectfully submitted,

S. A. ANDERSON,
509 *Exchange Bank Bldg.*,
St. Paul, Minnesota,
Attorney for Respondent.

T. D. SHEEHAN,
H. J. GOODWIN,
427 *Metropolitan Bank Bldg.*,
St. Paul, Minnesota,
Of Counsel for Respondent.

END

SUPREME COURT OF THE UNITED STATES.

No. 268.—October Term, 1925.

Chicago, Milwaukee & St. Paul Railway Company, Petitioner, *vs.* Edith F. Coogan as Special Administratrix, etc.	On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[June 1, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner is an interstate carrier by railroad. William Coogan came to his death at Farmington, Minnesota, July 14, 1923, while employed as a brakeman on one of its interstate trains. Respondent brought this action in the district court of Dakota County in that State under the Federal Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65, to recover damages for the benefit of the widow and children of the deceased. At the close of all the evidence, petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of petitioner, and that any verdict for respondent would be based upon speculation and conjecture. The motion was denied, and there was a verdict for respondent. A motion for judgment in favor of petitioner notwithstanding the verdict was overruled. Judgment for respondent was given by the trial court; and, on appeal, it was affirmed in the highest court of the State. 160 Minn. 411. The case is here on writ of certiorari. § 237, Judicial Code.

Petitioner contends that the evidence is not sufficient to sustain a finding that any negligence on its part caused or contributed to cause the death.

By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. *Second Employers' Liability Cases*, 223 U. S. 1, 55;

Seaboard Air Line v. *Horton*, 233 U. S. 492, 501. The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. *St. L. & Iron Mtn. Ry.* v. *McWhirter*, 229 U. S. 265, 277; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *New Orleans & N. E. R. R. Co.* v. *Scarlet*, 249 U. S. 528.

Petitioner's train 92 was made up at the Farmington yard by a switch crew shortly after seven o'clock in the morning. Deceased was the rear brakeman of the road crew which was to take the train to Austin. He was killed before the train was ready to start. There was no eye witness, and the case depends on circumstantial evidence. The tracks in the yard run east and west. The most northerly is the main line track; and, commencing with that one, the others are numbered consecutively 1, 2, 3, etc. Cars were taken from other tracks and put upon track 1 to make up the train. The caboose was kicked—that is, detached from the engine in motion and sent by momentum—east to a place where it was stopped by deceased who rode and controlled it by handbrake. Two cars were in like manner put upon that track. They were controlled by a brakeman of the switch crew at the handbrake on the east car, which coupled automatically to the caboose. Deceased was then standing on the ground beside the caboose. That was the last time he was seen before the accident. Similarly nine or ten more cars were sent east on track 1, and under control of the same brakeman were coupled to the others. And then three or four cars—making up all that were to go in the train—were moved east on that track attached to the engine until they came into contact with the cars already there. Then the engine was stopped to discover whether the coupling made. It was found that it had; and, in order to clear the switch, the engine moved all the cars east about two car lengths—66 to 80 feet. Then the

switch engine was detached. Immediately the road engine came and was coupled to the cars. The air hose was coupled between the engine and the first car. But it was found that the air line was open at some other place. The brakeman of the switch crew walked east along the south side of the train and coupled the hose at the east end of the last cut that was set in. After that, and while going toward the rear, he found the body of deceased. It was near the west end of the second car from the caboose, and was lying parallel with the track outside the south rail and on or at the ends of the ties. There were indications on the ground sufficient to show that he had been between the rails of the track; that he had been run over by the east truck of the car next to the caboose; that his left leg and left arm had been crushed between wheel and rail, and that his body had been dragged about 15 feet. There was evidence to support respondent's contention that it was the duty of deceased to couple the air hose, and that prior to the accident all couplings had been made except that made by the brakeman of the switch crew and the one at the caboose.

The breach of duty relied on is this. About 12 inches south of the south rail of the track, and fastened to the ties by clamps and spikes, there was an air pipe line extending about 800 feet. It was installed three or four years before the accident. At the time of the accident, a stretch of the pipe line about 15 feet in length had been loosened and bent three or four inches toward the rail and upward leaving a space of from three and one-half to four inches between it and the ties. It had been in that condition for some months. The evidence is sufficient to warrant a finding that there was a breach of duty in this respect. But the precise question for decision is whether the condition of the pipe caused or contributed to cause the death of deceased. The east end of the part so loosened and bent was about 15 feet west of the place where the body of deceased was found. Respondent argues that a brakeman, going in from the south side to couple the hose between the caboose and rear car, naturally would step inside the south rail with his right foot, leaving his left foot between the rail and the air pipe line. As to that the evidence is in conflict, but it will be taken to be sufficient to sustain the contention. The shoes worn by deceased at the time of the accident were received in evidence. The outside of the

counter of the left shoe was scratched and showed a marked rounding depression parallel with the sole and just above the heel. This condition was first noticed some days after the accident. In the meantime the shoes had been left in a garage and no attention was given to them. The depression in the counter was not so clear at the trial as when first noticed. The foregoing indicates the substance of all the evidence bearing on the cause of death.

The case was tried, and respondent supports the judgment, on the theory that when the switch engine stopped after the last coupling deceased went between the caboose and car to couple the air hose; that he stepped between the rails with his right foot leaving his left foot outside the south rail and between it and the pipe line; that, stooping to reach the air hose, his left foot slipped backward under the bent pipe; that, before he had time to make the coupling, the cars were started backward in the movement to clear the switch; that, when he attempted to straighten up, his left foot was caught under the pipe and he was forced backward, run over and killed. It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *United States* v. *Ross*, 92 U. S. 281, 284; *Manning* v. *Insurance Co.*, 100 U. S. 693, 698. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred that he postponed effort in that direction until after all the switching had been done and until the engine had hold of the string of cars. And then it must be inferred that he went between the cars in the manner claimed—his right foot between the rails leaving his left foot outside where, it is argued, it was caught under the bent pipe.

The "rounding depression" on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when

or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed; and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down or later while he was being dragged. But there is nothing to show that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.

It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524. When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pawling* v. *United States*, 4 Cranch 219, 221; *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663; *Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 488; *St. L. & Iron Mtn. Ry. Co.* v. *McWhirter*, *supra*, 282; *St. Louis-San Francisco Ry.* v. *Mills*, — U. S. —, decided May 24, 1926.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.